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(29,632)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 335

HERMAN G. GERDES, AS TRUSTEE IN BANKRUPTCY OF
ABRAHAM LUSTGARTEN, BANKRUPT, PETITIONER,

vs.

ABRAHAM LUSTGARTEN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1] **UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK**

In Bankruptcy

No. 29252

In the Matter of ABRAHAM LUSTGARTEN, Bankrupt.

REPORT OF SPECIAL MASTER

To the Honorable the Judges of the United States District Court for the Southern District of New York:

I, Peter B. Olney, Jr., the undersigned Referee, to whom, as Special Commissioner, the specifications of objections to the discharge of the above named bankrupt were referred for examination, testimony and report, do hereby report as follows:

On the hearings before me I was attended by Messrs. Zalkin & Cohen, attorneys for Trustee (by Mr. Cohen of counsel); by Messrs. Blumenstiel & Blumenstiel, attorneys for creditors; by L. J. Bershad, Esq., attorney for bankrupt; Albert Falk, Esq., attorney for creditors, and by the bankrupt in person.

The petition in bankruptcy was filed herein on March 1, 1921, which was followed by an adjudication on April 4, 1921.

The only specifications upon which evidence was introduced before me are the following:

[fol. 2] "First—That the said bankrupt gave to the Corn Exchange Bank, an objecting creditor, a certain signed statement, purporting to show its financial condition, which was false and that he obtained credit upon this false statement.

"Second—That the bankrupt fraudulently concealed the sum of \$2,000 which he transferred to Louis Lustgarten, his nephew, in payment of a fictitious debt."

On or about January 4, 1910, the bankrupt, for the purpose of obtaining credit, gave to the Corn Exchange Bank, the objecting creditor, a financial statement of his assets and liabilities as of December 15, 1919. The said financial statement was at variance with the bankrupt's books in two respects: The item shown as merchandise given as \$39,004.97 and item of accounts receivable given as \$30,642.50, the financial statement showing a net surplus of \$58,135.89, whereas the figures from the books show a surplus of only \$23,158.43—the financial statement thus showing an inflation to the extent of \$32,388.46. The bankrupt says that the discrepancy is explained by faulty bookkeeping and that the financial statement truly reflected his financial condition at the time given. Whether the bankrupt's explanation is the true explanation, or whether the financial statement was not a true statement of the condition as

of the date it was given, and if so, whether the bankrupt knew that it was not a true statement, are difficult questions of fact to determine from the evidence before me. In my opinion it is unnecessary to decide these questions of fact. On October 29, 1920, the Corn Exchange Bank loaned to Lustgarten \$5,000 by discounting his note [fol. 3] in that amount. On November 4, 1920, they loaned a further \$5,000 by discounting his note, and on February 11, 1921, discounted an additional note for \$1,000. Representatives of the bank testified that in extending this credit they relied upon the financial statement above mentioned. In view of the financial depression which prevailed in the United States in the year 1920, and of which the Court is bound to take judicial notice, it may well be questioned whether in extending credit on October 20, 1920, and at the subsequent dates above mentioned, the bank did really rely on the statement received in January, 1920, of the bankrupt's financial condition as of December 15, 1919. But assuming that the bank did rely upon the statement, as a matter of law, in my opinion, it had no right to so rely. The statement contained no express provisions as to the length of time when it could be relied upon and no provisions expressly making it a continuing statement. However, the law is that it was a continuing statement, but only for a reasonable time after it was given. Under the business conditions existing in the year 1920 such reasonable time cannot be regarded as extending from January 4th to October 29th, 1920. (In re B. & R. Glove Corporation, U. S. C. C. A., Second Circuit; opinion by Rogers, J., not yet reported.) It follows that the specifications of objections to the discharge of the bankrupt based on the obtaining of credit from the Corn Exchange Bank upon a materially false financial statement have not been sustained and should be dismissed (In re B. & R. Glove Corporation, *supra*; In re Braverman, 199 Fed., 862; 28 A. B. R., 513).

Counsel for the objecting creditor cites the case of Haimowich [fol. 4] vs. Mandel, 243 Fed., 338, as authority for their contention that if the financial statement was false and was relied upon, it was ground for denying the bankrupt's discharge. In the Haimowich vs. Mandel case credits was extended in September, 1912, upon a statement issued in March, 1912. Whereas six months in the year 1912 might well have been considered a reasonable time within which a financial statement could be relied upon, nevertheless, in view of the decision in the B. & R. Glove case above mentioned, from January 4, 1920, to October 29, 1920, was a length of time beyond which, as matter of law, the financial statement could be relied upon.

As to the second specification relied upon, namely, the alleged concealment of \$2,000 from his Trustee in Bankruptcy by the bankrupt by transferring same to his nephew, Louis Lustgarten, in payment of an alleged fictitious debt, the testimony of the bankrupt is that his nephew had continued in his employ for about nine or ten years, and that beginning 1919 the nephew's salary was \$50 per week; that he drew \$30 and left with the bankrupt \$20 for saving purposes. That this arrangement continued throughout 1919. In 1920 his compensation was increased to \$60 per week, he drawing

only \$40 and leaving \$20 with the bankrupt for saving purposes. That in the month of December, 1920, said Louis Lustgarten became engaged to be married and requested the money from his uncle and received same from him as a matter of right. The only evidence offered by the Trustee to contradict the evidence of the bankrupt was of a negative character, namely, that the bankrupt's books did not have an account with Louis Lustgarten showing a credit to him and a debit to the bankrupt of the amount of his wages re-[fol. 5] tained for saving purposes. To be sure, proper bookkeeping would indicate that such an account should have been kept. However, the failure to have done so, is not of itself sufficient to establish that the bankrupt intentionally and fraudulently failed to have such an account in his books. There is nothing before me to show that the Trustee, if such were the fact, could not have called Louis Lustgarten and others as witnesses to show the falsity of the bankrupt's testimony.

No evidence was adduced by the Trustee that the bankrupt was insolvent in December, 1920, when the said payment was made, nor any evidence that Louis Lustgarten received the said money and kept same for the bankrupt under or subject to his control. In my opinion the Trustee has failed to sustain the burden of proof in establishing the specification of objections to the discharge of the bankrupt based on the payment of \$2,000 to Louis Lustgarten.

I therefore report that the specifications of objections not having been established, I recommend that the discharge of the bankrupt be granted.

The special Commissioner has given consideration to this matter on March 10, 17, 24; April 21; May 5; June 28; July 5, 6, 23, 27 and 31, 1922.

The charges of the stenographer, Herman Parkus, are \$6.00.
All of which is respectfully submitted.

Dated, New York, July 31, 1922.

Peter B. Olney, Jr., Special Commissioner.

[fol. 6] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

SPECIFICATIONS OF OBJECTIONS

The Corn Exchange Bank of New York City, a corporation duly organized and existing under and by virtue of the laws of the State of New York, a creditor of the above bankrupt, having duly filed its appearance in opposition to the discharge of said bankrupt, by Albert Falck, its attorney, objects to the discharge of the said bankrupt, and as grounds for such object-s does file and urge the following specifications, upon information and belief:

First. Said bankrupt, with intent to conceal his true financial condition and the financial condition of his business, while engaged in said business, failed to keep true books of account and records from which his true financial condition might or could be ascertained, in that he failed to record in said books of account obligations due him and moneys received by him; that he failed to keep a true record of the amounts of money due and owing by him; bills and notes payable, and accounts payable by him, outstandings accounts and moneys due him.

[fol. 7] Second. That said bankrupt gave to the Corn Exchange Bank, the objecting creditor herein, a certain signed statement, purporting to show his financial condition. That said statement was made in writing to said Corn Exchange Bank, with the intent and purpose on the part of said bankrupt of having the same circulated to persons to whom he might apply for credit, including your objectors, and that your objectors upon the receipt of such statement and relying upon the same, extended credit to said bankrupt and loaned moneys to him relying thereon. That the said statement is dated January 5, 1920, and purports to show the financial condition of the bankrupt as of December 15, 1919.

Third. The following is a statement of the assets and liabilities as contained in the said statement:

Assets

Merchandise on hand (at cost)	\$39,004.97
Accounts outstanding, due from customers, all good....	30,642.50
Cash on hand	945.63

Cash in the following banks:

Corn Exchange Bank	6,319.31
Chatham & Phenix	2,723.48
Fixtures, present value	1,500.00

Total assets	\$81,135.89
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Liabilities

For merchandise, on open account	\$3,000.00
Borrowed from banks	20,000.00

Total liabilities	\$23,000.00
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Net worth is at least \$58,135.89.

[fol. 8] Fourth. That the said bankrupt knew and had reason to know that the said statement was false and untrue.

Fifth. That the said bankrupt was not at the time of the making of the said statement or at the time the statement purported to show

the condition of the bankrupt worth \$58,135.89, or any like sum: that he did not own personal property of the values stated in said statement; that said properties were not worth the sums stated by him or any like sum; that his liabilities were not the sum of \$23,000, or any like sum, but were greatly in excess thereof. That his total assets were not at either of said times worth \$81,135.89, but were as a matter of fact much less, and known by him so to be. That the personal property was much less than said amount; that the liabilities were greatly in excess of \$23,000 and that his net worth was at said time much less than \$58,135.89.

Wherefore, your petitioner prays for a hearing on the objections raised in these specifications and that the application for a discharge herein be denied.

Dated, New York, December 13th, 1921.

Corn Exchange Bank, By W. E. Frew, President, Petitioner.

[fol. 9] STATE AND COUNTY OF NEW YORK,
Southern District of New York, ss:

Walter E. Frew, being duly sworn deposes and says: That he is the president of the Corn Exchange Bank, the objecting creditor herein; that he has read the foregoing specifications of objections and knows the contents thereof; that the same are true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the reason this verification is not made by the objecting creditor herein is that the said objecting creditor is a corporation, and the grounds of deponent's belief as to all matters in said specifications not stated upon his own knowledge are investigations which deponent has caused to be made concerning the subject-matter of this proceeding, and information acquired by deponent in the course of his duties as such officer of said corporation.

Walter E. Frew.

Sworn to before me this 13th day of December, 1921. E. H.
Denike, Notary Public, No. 46, New York County. N. Y.
Reg. No. 2248A.

[fol. 10] DISTRICT COURT OF THE UNITED STATES FOR THE SOUTH-
ERN DISTRICT OF NEW YORK

[Title omitted]

SPECIFICATIONS

Rusch & Co., creditors and persons interested in the estate of the above-named bankrupt, do hereby oppose the granting of a discharge of said bankrupt from his debts, and for grounds of such opposition

do hereby file the following specifications, upon information and belief:

First. The said bankrupt, with intent to conceal his true financial condition and the financial condition of his business, has destroyed, concealed, or failed to keep correct books of account or records from which such condition might or could be ascertained, and he has knowingly, fraudulently and willfully omitted, or caused to be omitted, entries in certain of his books, in order to mislead his creditors, and conceal from them his true financial condition.

Second. That said bankrupt, while a bankrupt, knowingly, fraudulently and willfully concealed, and still conceals from his trustee in bankruptcy herein, property belonging to his estate in bankruptcy, consisting of moneys of the value of Two thousand (\$2,000) [fol. 11] Dollars and upwards which property he has transferred and conveyed to certain relations in alleged payment of fictitious debts, but which cash and property are being held, in whole or in part, in secret trust for said bankrupt, by his said relations.

Third. He has knowingly and fraudulently made a false oath or account in or in relation to these bankruptcy proceedings, by verifying his schedules in bankruptcy and alleging therein that same contained a statement of all his estate, both real and personal, when, as a matter of fact, the property referred to in specifications "Second" hereof, and other property belonging to his estate in bankruptcy, is not property scheduled therein.

Fourth. That said bankrupt has made false oath in connection with his application for discharge, in that he swore he has no property save such property as has been turned over to his estate in bankruptcy herein, whereas he did not turn over the property claimed to be concealed herein.

Wherefore, objection is made to the discharge of the bankrupt herein, and a hearing and the judgment of the Court is respectfully asked thereon.

Rusch & Co., Objecting Creditor, By ——. Blumenstiel & Blumenstiel, Attorneys for Objecting Creditor, Office & P. O. Address, 165 Broadway, Borough of Manhattan, City of New York.

[fol. 12] UNITED STATES OF AMERICA,
Southern District of New York, ss:

———, being duly sworn, deposes and says: That he is one of the firm of Rusch & Co., objecting creditor herein. That he has read the foregoing specifications and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters, he believes it to be true.

Sworn to before me this — day of December, 1921.

[fol. 13] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

HEARING BEFORE SPECIAL MASTER

Before Hon. Peter B. Olney, Jr., Referee

Hearing on Specifications, Objections to Discharge

New York, March 10, 1922—2 o'clock p. m.

Appearances: Messrs. Zalkin & Cohen, Attorneys for Trustees, by Mr. Cohen, of counsel; Messrs. Blumensteil & Blumensteil, Attorneys for Creditors, by Mr. Krinsky, of counsel; L. J. Bershad, Esq., Attorney for Bankrupt; Albert Falk, Esq., Attorney for Creditor, by Mr. Farb, of counsel; Mr. Abraham Lusgarten, the Bankrupt, in person; Mr. William Broomfield, a witness; Ferdinand Schnell, a witness.

[fol. 14] WILLIAM BROOMFIELD, a witness called by the Trustee, having been first duly sworn testified as follows:

Direct examination.

By Mr. Cohen:

Q. Where do you live?

A. 1478 Vyse Avenue, Bronx.

Q. Are you connected with Woods Dry Goods Commercial Agency?

A. Yes.

Q. In what capacity?

A. Reporter.

Q. Have you produced some records here in pursuance to a subpoena duces tecum served on you?

A. I have.

Q. Will you please produce the record?

A. Yes, here they are.

Q. This paper that you produced here, where did you obtain that?

Mr. Bershad: I object to that as incompetent and not the best proof.
The Referee: Qualify him, Mr. Cohen.

Q. What is your connection with Woods Dry Goods Commercial Agency?

A. A reporter.

Q. Was this paper taken from the files of Woods Dry Goods Commercial Agency by you?

Mr. Bershad: I object in the ground it may have been placed there by anybody.

The Referee: Overruled.

Mr. Bershad: Exception.

A. I did.

Q. In what department of Woods Dry Goods Commercial Agency was that filed?

[fol. 15] Mr. Bershad: I object to that as not binding and it is immaterial.

The Referee: Overruled, if he does not connect it you may move to strike it out.

A. In our dead file.

Q. Had you ever seen this statement before this day?

A. Yes.

Q. When was the first time you saw this statement?

A. On or about January 6th, 1920.

Q. Did you receive it from any particular person?

A. No.

Q. How did it first come to your notice?

A. Through the mail.

Mr. Bershad: I object and move to strike the answer out.

The Referee: Overruled.

Mr. Bershad: Exception.

Q. Is this the envelop- in which it came?

Mr. Bershad: Objection.

The Referee: Overruled.

Mr. Bershad: Exception.

A. It is.

Q. Since that time has this document been continually in the files of Woods Dry Goods Commercial Agency as far as you know?

Mr. Bershad: I object to that.

The Referee: Overruled.

Mr. Bershad: Exception.

A. It has.

[fol. 16] Mr. Cohen: I ask that this paper and the envelope be marked for identification.

Paper and envelope marked "Trustee's Exhibit 1 for Identification, March 10th, 1922."

Q. Will you state in a general way what the business of the Woods Commercial Agency is?

A. Furnishing commercial reports to subscribers.

Cross-examination.

By Mr. Bershad:

Q. How long have you been in the Woods Dry Goods Commercial Agency?

A. Over fifteen years.

Q. In what capacity did you first go there?

A. Originally as a boy.

Q. You have nothing to do with the credit department, have you?

A. No, sir.

The credit department is in the hands of some one else?

A. Yes.

Q. That person is not here?

A. I don't understand.

Q. The man or woman who has charge of the credit department is not here in Court?

A. No.

Q. Who has charge of the credit reports in your agency?

A. I don't know what you mean.

Q. Receiving the reports, passing on the reports?

A. A man named Heyser.

Q. He is not here?

A. No.

Q. As far as you know has he any personal knowledge of this statement?

A. Not to my knowledge, I have no idea.

Q. Do you know anybody else who has any knowledge other than yourself?

A. I cannot say.

Q. By looking at this exhibit aside from any independent data [fol. 17] or records, you are unable to say when you first saw this paper, is that correct?

A. Not the exact day, I cannot tell that, no.

Q. Can you say whether you got this paper in 1918, 1919 or 1920?

A. No, I cannot.

Q. You don't even know whether you got this in 1921, the early part of 1921?

A. I cannot say.

Q. You cannot say?

A. Not the exact date.

Q. Can you say whether you got it in 1918, 1919, 1920 or 1921?

A. On or about the date signed here, January 6th.

Q. How do you know that?

A. On our records.

Q. I asked you from records here or any record on this paper here and you answered no?

A. That is right.

Q. So you do not know of your own knowledge when this statement was received by Woods Dry Goods Commercial Agency?

A. On the records here, no.

Q. Did you produce all the records here?

A. No.

Q. You got a subpoena to produce your records?

A. Only the financial statement.

Q. Have you your subpoena here?

A. Yes, sir, here it is.

Q. You did not get this, you took it from the dead files from your office?

A. Yes.

Sworn to before me this — day of March, 1922. — —

[fol. 18] FERDINAND SCHNELL, a witness called by the Trustee, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Cohen:

Q. What is your address?

A. Garwood, New Jersey.

Q. Are you connected with the R. G. Dun Agency?

A. Yes.

Q. In what capacity?

A. Investigator.

Q. What is their business?

A. Giving commercial reports to subscribers.

Q. Have you produced any records here in answer to a subpoena?

A. I did.

Q. Will you show them to me, please.

A. Yes.

Q. This paper and envelope attached which you have produced here, will you kindly state from whom you got it?

A. It was gotten out of our statement files.

Cross-examination.

By Mr. Bershad:

Q. Did you get it out yourself?

Mr. Cohen: I object to that.

The Referee: Overruled.

A. Not myself.

By Mr. Cohen:

Q. Who gave it to you?

A. The young lady in charge of the statement department.

Mr. Bershad: I ask that that answer be stricken out.

The Referee: Overruled.

Q. Do you know how long this paper has been in the possession of the R. G. Dun Company?

A. No.

[fol. 19] Q. Is there any file mark on this paper of the R. G. Dun Company indicating when it was received?

Mr. Bershad: I object, the statement speaks for itself.

The Referee: Overruled.

Mr. Bershad: Exception.

A. Yes.

Q. Will you point it out to me?

A. Yes, here it is.

By Mr. Bershad:

Q. You didn't make this statement?

A. No.

Q. Do you know when this statement or this stamp was placed there?

A. No.

Q. You have no idea whether the stamp was placed there at the time on which this purports to be dated?

A. No.

By Mr. Cohen:

Q. Can you tell us the name of the person in the employ of the R. G. Dun Company who affixed this stamp?

A. No, sir.

Mr. Cohen: I asked that this be marked for identification.

(Paper referred to marked "Trustee's Exhibit 2 for identification, March 10th, 1922.")

Q. Now will you please state the business of the R. G. Dun Company?

A. I did state it.

Mr. Cohen: I withdraw the question.

Sworn to before me this — day of March, 1922.

[fol. 20] ABRAHAM LUSTGARTEN, called as a witness by the Trustee, having been first duly sworn, testified as follows:

(Examination by written interrogatories on account of witness being totally deaf.)

Direct examination.

By Mr. Cohen:

Q. The question I have written here is: Is this signature on this paper signed by you; presenting witness with Trustee's Exhibit No. 2 for identification, March 10th, 1922?

A. This is my signature.

Mr. Cohen: I offer this paper in evidence. (Paper referred to received in evidence and marked, "Trustee's Exhibit 2, March 10, 1922.")

Q. I hand to the witness Trustee's Exhibit 1 for identification, and submit to him the written question: Is this signature yours?

A. Yes, this is my signature.

Mr. Cohen: I offer this paper in evidence. (Paper referred to received in evidence and marked, "Trustee's Exhibit 1, March 10th, 1922.")

Mr. Cohen: The Trustee now offers in evidence the examination of Abraham Lustgarten under Section 21A and at a first meeting of his creditors.

Mr. Bershad: I object to it, it is not competent or material on this proceeding.

The Referee: Has the witness signed the testimony?

[fol. 21] Mr. Cohen: No, sir.

The Referee: You may have the witness read over and sign his testimony and I will then receive it subject to a motion to strike out any parts which Mr. Bershad thinks are incompetent, but it will not be received until it has been gone over and signed by the bankrupt.

Mr. Cohen: I also desire to offer in evidence the testimony of Louis Lustgarten at a first meeting of creditors. My only purpose is to get the admission of Louis Lustgarten that in the month of December, 1920, he received \$2,000 in installments of \$1,000 each.

The Referee: Supposing you let Mr. Bershad have that testimony and he can look it over and he may stipulate what you wish.

Mr. Cohen: Very well, sir.

Sworn to before me this — day of March, 1922. — — —

Adjourned to March 17th, 1923, 3:30 P. M.

[fol. 22] Re ABRAHAM LUSTGARTEN, Bankrupt
 Before Hon. Peter B. Olney, Jr., Special Master
 Adjourned Hearing Specifications

New York, March 17th, 1922—3:30 o'clock, p. m.

Present: The Master, Mr. Cohen, Mr. Bershad, Mr. Falk, Mr. Stillman, Mr. Horton, Mr. Barrett, Mr. Lustgarten.

ABRAHAM LUSTGARTEN recalled:

(Examination by written interrogatories.)

Direct examination.

By Mr. Cohen:

Q. Is that your signature?

A. Yes.

Mr. Cohen: I offer this statement in evidence.

Mr. Bershad: There is more than one statement and they all look alike; I object, the testimony is already before the Court, it is cumulative.

The Master: Overruled.

[fol. 23] Mr. Bershad: I object further on the ground the contents are already before the Court.

The Master: Overruled.

Statement referred to received in evidence and marked, "Trustee's Exhibit 1, March 17th, 1922."

Mr. Bershad: May I ask that only the written part be put in; it does not appear he signed it with full knowledge of its contents.

The Master: Overruled.

Sworn to before me this — day of March, 1922. — — —

WILLIAM B. HORTON, a witness called by the Trustee, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Cohen:

Q. Are you connected with the Corn Exchange Bank?

A. Yes.

Q. In what capacity?

A. Manager of the Fifth Avenue branch.

Q. Is the Corn Exchange Bank a creditor of the bankrupt Lustgarten?

A. Yes.

Q. For what?

A. I think \$11,000.

Q. What is the nature of the obligation?

A. Three promissory notes.

Q. I show you three documents and ask you whether these are the three notes which constitute the claim of the Corn Exchange [fol. 24] Bank?

A. These are the notes.

Q. Are you familiar with the signature of Abraham Lustgarten?

A. Yes.

Q. Do you identify his signature on these notes?

A. Yes, sir.

Mr. Cohen: I offer in evidence these three notes.

Notes referred to received in evidence and marked as one exhibit, "Trustee's Exhibit 2, March 17th, 1922."

Q. Mr. Horton, were these notes which are now marked Trustee's Exhibit 2 of this date presented to you personally for discount?

A. Two of them were.

Q. Did you have before you this paper, Trustee's Exhibit 1 of this date, at that time?

A. Yes, sir, we had this statement at that time.

Mr. Bershad: I move to strike out the answer as not responsive.

The Master: Overruled.

Mr. Bershad: Exception.

Q. When you discounted these two notes did you rely on this statement?

Mr. Bershad: I object to that as leading.

The Master: Reframe the question.

Q. What did you do when the notes were presented to you for discount?

A. We referred to our credit file of which this statement was a part.

Q. Did you examine the credit file?

A. Yes.

Q. Did you rely upon your credit file?

[fol. 25] Mr. Bershad: I object to that as leading.

The Master: Overruled.

By the Master:

Q. Did you examine your credit file before you gave him any money on the notes?

A. Yes.

By Mr. Cohen:

Q. Did you rely upon that statement when you discounted these notes?

Mr. Bershad: I object to that as calling for a conclusion.

The Master: Overruled.

Mr. Bershad: Exception.

A. I did.

By the Master:

Q. Did you have any other information other than what is contained on that paper as to this man's financial responsibility?

A. Not at all.

Q. You didn't know personally how that got into your files?

A. Yes, I did know it was handed to us by his representative.

Mr. Bershad: I move to strike out the answer as not responsive.

The Master: Sustained.

By Mr. Cohen:

Q. Who handed it to you?

A. Hyman Josephson.

Sworn to before me this — day of March, 1922. — — —.

[fol. 26] ABRAHAM LUSTGARTEN, resumes the stand:

By the Master:

Q. Who is Hyman Josephson, do you know?

A. I have no such name on the books at all, I never heard that name at all, I don't know what he is.

Sworn to before me this — day of March, 1922. — — —.

Mr. Bershad: I ask that the testimony of the previous witness with reference to the obtaining of this statement be stricken out.

The Master: Overruled: he testified he received it from a man named Hyman Josephson, the rest has been stricken out.

Mr. Bershad: Exception.

WILLIAM C. HORTON, resumes the stand:

Cross-examination.

By Mr. Bershad:

Q. How long have you been with the Corn Exchange Bank?

A. Close to twenty-five years.

Q. How long in the credit department?

A. I never was in the credit department.

Q. What department are you in?

A. I am the manager of the bank, that branch.

Q. Who is the credit man?

A. I am.

Q. You supervise the credits?

A. Yes, of our branch, not of the bank.

[fol. 27] Q. Of the Corn Exchange branch at Fifth Avenue?

A. Yes.

Q. That is where the bankrupt had an account?

A. Yes.

By the Master:

Q. The bankrupt had an account with your bank?

A. Yes, in our branch.

By Mr. Bershad:

Q. How long have you been the manager of the branch?

A. Since August, 1918, I think.

Q. How long prior to October 9th, 1920, had you known the bankrupt?

A. I cannot say as to that, I have known him as a customer of the bank.

Q. All you knew was the account appearing on the books?

A. Yes, to the best of my recollection, I met him probably once or twice.

Q. If you met him outside you would not know him?

A. I don't know whether I would or not.

Q. The name of Abraham Lustgarten was only identified to you by the fact that you had such an account?

A. Yes, his was simply a business account.

Q. In other words you could not offhand fix a picture of the bankrupt in your mind before October, 1920?

A. I would not say that.

Q. Did you, as a matter of fact, know him?

A. I knew him as a customer of the bank.

Q. Did you know his face?

A. Yes, I knew his face, yes, I knew Abraham Lustgarten.

Q. Without him announcing who he was would you know him if he came in and sat down?

A. I cannot say positively, I may and I may not.

[fol. 28] Q. Just examine this Trustee's Exhibit 1 and tell me when you received that?

A. It was received on January 6th, 1920.

Q. Is there a notation there in your own handwriting?

A. Not mine.

Q. In whose handwriting is that?

A. The assistant manager.

Q. And that purports to be the date you got it in your bank?

A. That is the date.

Q. As far as you know?

A. Yes.

Q. When for the first time did you have occasion to examine this paper?

A. I don't keep any record of the time I look at the papers, I refer to them as notes are offered for discount.

Q. When did you first have occasion to refer to it with reference to any notes to be discounted?

A. I cannot say as to that, I would only be guessing.

Q. You answered Mr. Cohen that you referred to that statement in extending credit to the bankrupt, is that correct?

A. Yes, sir.

Q. Is that true with reference to each one of the three notes?

A. With reference to the two notes.

Q. Which of the two notes?

A. I can tell by looking at the notes.

Q. There are two \$5,000 notes, and one \$1,000 note?

A. I cannot tell without seeing the notes.

Q. Would not the amounts refresh your recollection?

A. No, I cannot answer without seeing the notes.

Q. Look at this note dated February 11th, 1921, \$1,000, did you have this statement before you at the time that credit was extended?

A. I didn't pass on that note, our assistant manager passed on that note.

[fol. 29] Mr. Bershad: May I ask this note be marked as a separate exhibit.

The Master: Yes, call it "A."

Note referred to marked "A."

Q. So that you personally had nothing to do with the extension of the credit of \$1,000 on this note?

A. I don't know what you mean, he has had a standing line of credit with us.

Q. Referring to this particular note when it was presented for discount, you say some one else in your bank passed on that particular credit?

A. That is right.

Q. Therefore you personally do not recall or you did not really have this statement in checking this note?

A. I didn't check this note.

Q. You didn't personally?

A. What do you mean?

Q. You answered Mr. Cohen that you relied on the contents of this statement?

A. Yes.

Q. So I say in checking the credit on this note you didn't rely on this statement?

A. I didn't check that credit.

Q. Was the statement or was it not relied on as far as you know?

A. I don't know what the assistant manager did.

Q. You don't know if the assistant manager did or not?

A. I have no information on that point at all.

Q. Look at this paper dated October 29th, 1920, a note for \$5,000, did you pass that credit?

A. I did.

Q. Are you sure about that?

A. Yes.

Q. Are there any records?

A. Yes.

Mr. Bershad: May I have this note marked B.

[fol. 30] The Master: Yes.

Note referred to marked "B."

Q. And this note, did you pass on that?

A. Yes, I passed on this the same way.

Mr. Bershad: Please mark this C.

Note referred to marked "C."

Q. You didn't talk to Mr. Lustgarten at the time these papers were presented?

A. I don't remember whether I did or not.

Q. What line of credit did he have with your bank?

A. I don't remember offhand, I think it was \$15,000 that he could have credit for, that is my impression.

Q. Have you any idea now at the time the paper of October, 1920, was presented, how much he had in the bank?

A. No, sir.

Q. You referred to his account at the time he came to your place?

A. What account?

Q. His record of what he owed you?

A. Yes.

Q. Do you know what he owed the bank on October 20th, 1920?

A. No, not without looking at the records.

Q. Have you any records with you?

A. No, sir.

Q. Or on November 4th, 1920?

A. I cannot tell offhand.

Q. Did you have any conversation with him at the time this note of \$5,000 was presented for discount?

A. I don't remember, I don't recall.

Q. You would not say that you did have a conversation with him at that time?

A. I said I don't recall whether I did or whether I did not.

Q. And the same answer holds true about the note of November 4th, 1920?

A. If that is one of the notes I initialed, yes.

[fol. 31] Q. Who was your assistant?

A. Charles A. Ingalls.

Q. Is he still with you?

A. Yes, he is still with us.

Q. Can you state to his Honor any conversation that you had with this bankrupt at any time that you talked with him?

A. No, I cannot state any conversation I had with him.

Q. Would you say you had any conversation or you don't recall it?

A. I don't say I never conversed with him, I converse with dozens of people every day.

Q. Don't you keep a credit file of each particular man?

A. I do.

Q. Don't you jot down memorandums of conversations you had with them?

A. Not unless it is of importance.

Q. Would you not regard the offering of paper to the extent of \$10,000 of sufficient importance to make memorandums?

A. No, that is all in our books.

Q. Your books would not show any conversation you would have with the customer about his account?

A. It has been Mr. Lustgarten's practice to send a clerk with his note when offered for discount.

Q. You say a clerk presented this paper?

A. I said it was his custom, I don't know who presented these papers, Mr. Lustgarten or his clerk.

By the Master:

Q. What was the name of the clerk he sent, if you know?

A. I don't know the name of the clerk, his clerk used to come to the bank every day and attend to his banking business.

[fol. 32] By Mr. Bershad:

Q. Did you see the clerk daily?

A. No, occasionally.

Q. Why did you say he came every day?

A. I said daily.

Q. You didn't see him daily?

A. No, I saw him coming in and out of the bank at times.

Q. How would you know it was his clerk?

A. I saw the pass book and checks.

Q. You say you saw him daily?

A. No, I didn't say I saw him every day.

Q. In passing credits—question withdrawn—who drew this statement up?

A. I don't know.

Q. That is a form you have in your bank?

A. Yes.

Q. Are the figures before you mentally without looking at this statement?

A. No.

Q. Will you please look at the figures and analyze them?

A. In what way?

- Q. Familiarize yourself?
- A. Yes, I have.
- Q. Are there any particular figures there you relied on?
- A. I relied on them as a whole.
- Q. On the net figures?
- A. No, the whole statement, both assets and liabilities.
- Q. Let's take item by item; item, merchandise on hand, \$39,004.97, did you scrutinize that item?
- A. What do you mean?
- Q. By finding out the character of the merchandise?
- A. No.
- Q. That is customary to do, is it not, with careful credit men?
- A. No, I would not say so.
- Q. Outstanding accounts, \$30,642.50, did you scrutinize this?
- A. This reads: "Outstanding accounts good?" We relied entirely on the customer's statement that the accounts were all good.
- [fol. 33] Q. Did you rely particularly on that item?
- A. No, no more than on the others.
- Q. Or the item, Corn Exchange Bank, \$6,319.31, you had that on deposit at the time, did you not?
- A. Yes.
- Q. That was on January 10th, 1920?
- A. Yes.
- Q. Can you tell me what balance if any he had in your bank at the time of the presentation of this paper?
- A. I cannot say without referring to the ledger.
- Q. Did you refer to the ledger when the paper was presented?
- A. I don't think so.
- Q. Did you refer to the ledger when the paper of October 5th was presented?
- A. I cannot say whether I did or not.
- Q. Skipping to the items of liabilities, I notice here an item of merchandise for merchandise on open accounts, \$3,000, did you notice that item?
- A. Yes, I saw it.
- Q. Is there anything about that item to attract your attention?
- A. No.
- Q. Would not that figure appear to be rather unusual, a round figure item like that?
- A. No.
- Q. Do you mean to tell me that would not attract your attention?
- A. No, I answered that I believe.
- Q. Did you ask him about?
- A. No, I didn't ask him anything about the \$3,000.
- Q. You had it before you?
- A. Yes.
- Q. When a man is presenting paper to you for \$10,000—question withdrawn— Here he has outstanding accounts close to \$31,000 and he had as his open accounts \$3,000, is that not an unusual situation?
- A. No, sir; not at all.

Q. When he discounted these two notes, do you recall whether [fol. 34] he had anything—question withdrawn— Then I understand you correctly to state you relied on each figure there?

A. I relied on the statement as a whole.

Q. On each figure?

A. I relied on the statement as a whole, the body of the statement.

Q. That inventory there was as of December 15th, 1919, is that right?

A. The statement so says.

Q. That shows the condition you relied on was as of December 15th, 1919?

A. Yes.

Q. The loan of October 29th, 1920, and November 4th, 1920, were almost a year later?

A. Yes.

Q. Do you still persist in saying you made no comment on these figures?

A. I did not.

Q. You are not interested to inquire whether there had been a change in the condition: the credit obtained from you personally was almost ten or eleven months later, didn't you as a practical credit man know there must have been a change in his condition?

A. I know there is a change every day.

Q. Surely there was a change in the period of ten months, so that it could not be the same as it purported to appear on Trustee's Exhibit 1?

A. There is a clause in this statement which he swore to, which says, "And further, whenever my financial condition is changed materially, etc."; we also relied on that.

Q. You knew, however, in spite of the contents of this clause that it was a physical impossibility that that condition of his should have continued the same for almost ten months?

A. As I said before, a man's condition changes all the time.

Q. So I say you knew that you were not relying on the figures in here?

A. I was relying on substantially the same condition, not on the same figures, but on the same condition.

[fol. 35] Q. You knew that that condition as evidenced in this statement ten months later could not be the same?

A. I said that, yes.

Q. Therefore, you could not have relied on these figures?

A. I relied on his net worth being the same.

Q. Do I understand you correctly to state you relied on the net worth? A. I relied on the whole statement.

Q. Did you rely on the net worth?

A. I relied on the statement as a whole.

Q. You knew the figures could not be the same?

Mr. Cohen: I object to that as repetition.

The Master: Sustained.

Q. Am I correct in stating you relied on the statement in this statement that in the event of a change in his condition, he would notify you?

A. I relied on the statement as a whole, of which this is a part.

Q. You will pardon me, my knowledge of credits may not be as extensive as yours, but I know a credit man tries to——

Mr. Cohen: I object to that as argumentative.

The Master: Sustained.

Q. Did you, sir rely on any particular figures there or any particular statement or on the entire statement knowing that condition must have changed?

A. I relied on the entire statement.

Q. Is that the best answer you can give me?

A. Yes, sir; that is the best answer I can give you.

Sworn to before me this — day of March, 1922. — — —.

[fol. 36] Mr. Cohen: I offer in evidence these checks which have been marked Trustee's Exhibit 4 as of August 11th, 1921, which were identified in connection with the testimony of the bankrupt at the first meeting of creditors.

Mr. Bershad: No objection.

PERCY F. BARRETT, a witness called by the Trustee, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Cohen:

Q. What is your business or profession?

A. Certified public accountant.

Q. Where did you receive your education?

A. New York University, and I hold a C. P. A. from the New York State Regents Board.

Q. How long have you been a C. P. A.?

A. Since 1915.

Q. Have you since then been continuously engaged in accounting?

A. Yes.

Q. Are you connected with Lewis C. Getting at the present time?

A. Yes.

Q. In connection with the bankruptcy of Abraham Lustgarten, did you audit some books?

A. Yes.

Q. I show you these books on the table, Exhibits 1 to 6, and ask you whether you made an audit and took an accounting of these books?

A. Yes, sir.

Q. Were you assisted by anybody?

A. An assistant from our office.

[fol. 37] Q. Substantially the greater part of the work was done by yourself?

Mr. Bershad: I object to that as calling for a conclusion.

Mr. Cohen: Question withdrawn.

Q. What part was done by yourself and what part by your assistant?

A. I worked on the general ledger and he prepared schedules of customers.

Q. One of the exhibits there is marked "Salesmen's Commission Book;" will you identify which exhibit that is?

A. That is Exhibit 5, August 11th, 1922.

Q. In the course of your examination and audit of these books, did you examine this book, Exhibit 5?

A. Yes, sir.

Q. In going through that book did you find any entry of the name of Louis Lustgarten?

A. No.

Q. What are the entries made in that book?

A. From the way this book is kept it appears they kept an account with each salesman.

Mr. Bershad: I ask that this witness be told to testify on what he saw.

Mr. Cohen: He is an expert, and as such is permitted to draw conclusions.

The Master: Overruled.

Mr. Bershad: I take an exception to all this line of questioning.

Q. You may continue, Mr. Barrett.

A. There are accounts in this book with various salesmen in which the salesman is given credit for sales made to various customers, and they are itemized down here and his commission figured up.

[fol. 38] Q. I ask you whether you find an entry in any other one of the books of any payment made to Louis Lustgarten?

A. I do.

Q. Please pick out the book and name the book and the exhibit number?

A. General Ledger, Exhibit 4.

Q. Will you please turn to the entry in the book last mentioned where the name of Louis Lustgarten appears and tell us what entries you find?

A. On page 45 under the heading, "Commission on sales," December 8th, there is an entry of \$1,000, and December 22nd, \$1,000, which is posted from the cash book, page 37, December, 1920.

Q. Will you resume in connection with the entries in the cash book?

A. That indicates that Louis Lustgarten was paid \$1,000 on De-

ember 8th and \$1,000 on December 22nd, as shown on entries on page 37 of the cash book.

Q. Did you find anywheres in the books a credit to any account of Louis Lustgarten to offset these debits?

A. I did not.

Q. Now, Mr. Barrett, in connection with your audit of these books did you examine the books and strike a balance as of December 15th, 1919?

Mr. Bershad: I object to that as calling for a conclusion of the witness' mind.

The Master: Overruled.

Mr. Bershad: Exception.

A. I did.

Q. Will you kindly state to the Court just what you did for the purpose of casting the balance sheet from these books as of December 15th, 1919?

A. These are my working sheets on that. I prepared a balance sheet from his general ledger as of December 15th, 1919, and found [fol. 39] the debits and credits to be in balance.

Q. Let me interrupt to ask this: did you find any trial balance entry in the books as of that day, December 15th, 1919?

A. I do not recall.

Q. The trial balance that you found for that day was made by you from the books you found in the place, from the figures in the books?

A. Yes, sir.

Q. I want to direct your attention to the trial balance that you struck as of December 15th, 1919, in connection with the amount of cash in bank, what did you find that item to be?

A. \$9,042.79.

Q. Did you find anything with respect to the amount of cash on hand?

A. There was nothing on the books to show cash on hand.

Q. In connection with the item of merchandise what did you find?

A. The merchandise as shown on his books amounted to \$24,721.17.

Q. Now I direct your attention to the item of machinery and fixtures, how did that appear on the books as of that date?

A. \$848.35.

Q. I now call your attention to the item of accounts receivable, how did that appear on the books as of that date?

A. \$9,053.25.

Q. Was there also an item of assets which he called "Contractors" that you found?

A. Yes, \$5,071.87.

Q. What is meant by that item, "Contractors"?

A. The garment makers sublet work to contractors, and that would represent money due him from contractors for merchandise due.

Q. What is the sum total of the assets you found on this trial balance?

A. \$48,737.43.

Q. Now, sir, I direct your attention to the statement of liabilities that you found in this trial balance, and ask you to tell us what [fol. 40] these items were?

A. Accounts payable, \$5,373.32; notes payable, \$20,000.

Q. Is there any other item of liability that you found?

A. Reserve for discount on sales, \$205.68, and capital account \$23,158.43.

By the Master:

Q. What was that?

A. That would be his net worth, the difference between his assets and his liabilities.

By Mr. Bershad:

Q. What are the total liabilities?

A. \$25,579.

Q. Leaving a net worth of \$23,158.43?

A. Yes.

Sworn to before me this — day of March, 1922. — — —.

Adjourned to March 24th, 1922, 3.30 p. m.

Re ABRAHAM LUSTGARTEN, Bankrupt

Before Hon. Peter B. Olney, Jr., Special Master

Adjourned Hearing on Specifications

New York, March 24th, 1922—3 o'clock, p. m.

Present: The Master, Mr. Cohen, Mr. Bershad, Mr. Ingalls, Mr. Barrett.

[fol. 41] CHARLES A. INGALLS, a witness called by the bankrupt, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Bershad:

Q. Please look at this statement, Trustee's Exhibit 1?

A. Yes.

Q. Where did you get that?

A. It was handed to me at my desk.

- Q. Who handed it to you?
A. Mr. Joseph.
Q. The only way you know it is the notation that appears on that paper?
A. I asked his name.
Q. You made that notation?
A. Yes.
Q. You don't know him?
A. I would not say that.
Q. Do you know him?
A. Yes, sir.
Q. Do you know the bankrupt?
A. I cannot say I could pick him out, I have met him.
Q. What is the date of the statement?
A. December 15th, 1919.
Q. Did you pass on that credit for the bank?
A. Yes.
Q. Did you extend any loans to the bankrupt?
A. Yes, sir.
Q. Do you know how many loans you extended to him?
A. I recall one.
Q. Which one was that?
A. A thousand dollars.
Q. This note of February 11th, 1921, Trustee's Exhibit 2?
A. Yes, sir.
Q. Did you personally attend to this transaction?
A. Yes, sir.
Q. Did you have any talk with the bankrupt at the time?
A. No, sir.
Q. Did you see the bankrupt?
A. No, sir.
[fol. 42] Q. Do you know when this paper was presented to you?
A. Yes.
Q. State as near as you can what occurred at that particular time when this paper was put in for discount?
A. I called for the folder which carries the credit information of Mr. Lustgarten and found he was entitled to the \$1,000.
The Master: Strike that out, what he found.
Q. What conversation did you have?
A. I had no conversation.
Q. Do you know who handed in this note for discount?
A. No.
Q. All you know is this note was handed in by some one and after that you went to your credit file and took out your credit reports, and what did you do then, did you refer to your ledger?
A. Just a minute, I took out the credit information and found this man was entitled to this discount.
Mr. Bershad: I ask that that be stricken out.
The Master: Granted.

Q. Did you take that paper out from your file?

A. Yes.

Q. Did you examine it before extending credit or discounting the note?

A. Yes, sir.

Q. Then what did you do?

A. I initialed the note and gave the discount to him.

Q. How many accounts have you in your bank?

A. Between two thousand five hundred and three thousand.

Q. You do not carry a line of credit of each man in your mind, do you?

A. No, sir.

[fol. 43] Q. Do you carry the line of credit of the active accounts?

A. No, sir.

Q. At the time that you took out this paper did you know how much the bankrupt was indebted to the bank?

A. Yes, sir.

Q. Did you refer to the ledger?

A. Yes, sir.

Q. You did not write up the ledger, nor have you anything to do with the entries?

A. No.

Q. Did you make any memorandum there in your own handwriting as to the limit of the credit?

A. No.

Q. Did you have any notations recorded in your ledger as to the line of credit to which this man was entitled?

A. No, sir.

Q. What line of credit was the bankrupt here getting from your bank at the time?

A. I think it was \$11,000.

Q. Did you fix that?

A. No.

Q. Who fixed that?

A. The board of directors.

Q. Was that the limit of his line?

A. No, sir.

Q. He had not exceeded his limit?

A. No.

Q. How much was his limit with your bank?

A. I think it was \$15,000, I did not look at the books at all.

Q. You stated you looked at that statement and in looking at that statement did you examine the item, merchandise on hand?

A. Yes, sir.

Q. Did you examine the amounts or the items following that?

A. Yes, sir.

Q. And proceeding further down, did you examine the item, cash on hand?

A. Yes, sir.

Q. And the amounts mentioned there, Corn Exchange Bank, and the fixtures?

A. Yes, sir.

Q. Now, what particular item was, in your opinion used as a credit item, did you rely on any particular item in checking the credit?

A. I would not rely on any one figure.

[fol. 44] Q. You would not or you did not?

A. I did not.

Q. Did you look at the item there on the liability side for merchandise on open accounts, \$3,000?

A. Yes, sir.

Q. Borrowed from banks \$20,000?

A. Yes, sir.

Q. That was before you?

A. Yes, sir.

Q. At that time you said he already had \$10,000?

A. Yes, about that.

Q. Did you scrutinize this item, borrowed from banks \$20,000?

A. I took it all in.

Q. Did you scrutinize it?

A. I don't know what you mean.

Q. Did you analyze it?

A. Yes.

Q. How did you scrutinize it?

A. I don't know what you mean, I looked at it.

Q. Did it attract your attention?

A. Yes.

Q. Was that, that item of \$20,000 and your item of \$10,000 that would make an item of \$30,000?

A. No, sir.

Q. You didn't so regard it?

A. No.

Q. How did you treat that \$20,000?

A. Borrowed from banks, \$10,000 was ours.

Q. \$10,000 from your bank and \$10,000 from other banks?

A. Yes, sir.

Q. Didn't these figures attract your attention at all as to the reason why this man needed more money in view of the fact his liabilities for open accounts was only \$3,000 and he had on deposit almost \$10,000?

Mr. Cohen: I object, the question assumes a statement of facts that are not shown, this statement is dated December, 1919, the question is highly unfair.

The Master: Sustained.

Mr. Bershad: Exception.

[fol. 45] Q. Now, you knew, didn't you, Mr. Ingalls, that these figures of February 11th, 1921, could not possibly be the same as they were on the 15th of December, 1919?

A. Naturally they could not be.

Q. You knew then, did you not that there was a change in his condition?

A. Certainly, there must have been.

Q. And you knew when you say you relied on these figures as a whole that these figures could not possibly be as recorded in that statement?

A. I did.

Q. You did not as a matter of fact rely on these figures on February 11th, 1921, that is correct, is it not?

A. If you speak of the figures, yes, if you speak of the whole statement, no.

Q. So you could not rely on these figures?

A. You could rely on them.

Q. On these figures, item after item?

A. If a man sells one thing he puts it down on the other side and that does not affect the totals; if he sells his goods he has outstandings or something like that.

Q. Without knowing if the goods were sold at a loss and these figures could not be the same, they must have shifted?

A. Yes, every day.

Q. Did you talk to any one about this matter?

A. Mr. Horton.

Q. Did he state what testimony he gave here the last time?

A. In a general way.

Q. Did you discuss it with him?

A. Not particularly, I just got back today, I was sick.

Q. He told you what testimony he gave here?

A. Yes.

Q. He asked you to refresh your recollection as to the transaction?

A. Yes.

Q. He aided you, did he not?

A. No, not at all.

[fol. 46] By Mr. Cohen:

Q. In connection with your testimony that the figures had changed, or that you did not rely on the figures, what did you actually rely on when you had that statement in front of you?

A. The whole statement calls for the man's condition on a certain date, we presume that to be the same unless he notifies us it is different.

Q. What you mean is, you do not depend on any individual figure but you depend on the net results in coming to a conclusion as to how much credit he should get?

Mr. Bershad: I object to that as leading.

The Master: Overruled.

Mr. Bershad: Exception.

A. Yes.

By the Master: \

Q. Is there a provision on that statement that any material change in the condition will be reported by the person making it?

A. There is, yes.

Q. Did you have that in mind when you examined the statement?

A. Always.

By Mr. Bershad:

Q. Do I understand you to contend that the bankrupt was in the habit of telling you every month or so the change in these figures, do you contend he could do that?

A. If he had proper books, he could.

Sworn to before me this — day of March, 1922. — — —.

[fol. 47] PERCY S. BARRETT recalled.

Cross-examination.

By Mr. Bershad:

Q. Mr. Barrett, did you notice that the handwriting in the books of the bankrupt after January, 1920, was different than the handwriting which appeared in the books up to December 31st, 1920?

A. I do not recall, there was different handwriting, but just what period it covered I do not remember.

Q. Can you by looking at it state?

A. There is various kinds of handwriting, but I am not qualified to answer as an expert on handwriting.

Q. Do you remember your testimony at the last hearing that you testified there was merchandise on hand with contractors of \$5,-071.87?

A. I stated the contractors' accounts showed a debit balance of that amount.

Q. What does that mean?

A. It may mean merchandise billed to them to be manufactured against which the contractor will charge them with the finished goods and there may be various items of cash, it is not necessarily merchandise.

Q. It may be an account receivable?

A. It is practically an account receivable, it may be for merchandise or it may be advances of money.

Q. How did you treat it?

A. As an asset.

Q. Distinguishing between an account receivable and merchandise, how did you call it?

A. I called it an asset.

Q. From what books did you extract that item?

A. From the general ledger, there may possibly be a little adjustment there, I will have to look. That is in the general ledger.

Q. Was that the statement of merchandise, \$24,721.17, that is in [fol. 48] correct, is it not?

A. You mean on his financial report.

Q. No, what you have extracted from the books.

A. The contractors' accounts show \$5,071.87, I am not speaking about his merchandise account.

Q. I am now directing your attention to the merchandise account, \$24,721.17?

A. The merchandise account appears on his books at \$24,721.17.

Q. How did you distribute this item of \$5,071.87?

A. It is an asset, I did not distribute it.

Q. Did you call it an account?

A. I called it an asset, I am only distributing according to his books, I did not go into details to find out from each contractor's account.

Q. You analyzed the statements and you proceeded to classify each of the items into a particular category to which each item belonged?

A. I showed that according to his books, he classified them, I did not.

Q. This item of \$5,071.87 you designed the last time as contractor's garments on hand or in the hands of contractors, did you not?

A. I have no recollection of designating it that way.

Q. If you did classify it that way were you in error?

A. I am not attempting to classify it and never did attempt to classify it. I took it from his books on page 150.

Q. So you did not analyze the different books to see whether the items constituting that were correct, did you?

Mr. Cohen: I object to that as already answered.

The Master: Sustained.

Q. Did you go to the sources to ascertain whether the figures there reflected on page 150 in red ink, whether they showed up some- [fol. 49] whereas else?

A. This general ledger was in balance, I did not go back.

Q. So if there had been an error you would have no way of knowing it?

A. Not in detail.

Q. Either in detail or any other way?

A. His general ledger was in balance.

By the Master:

Q. What does that mean exactly?

A. The general ledger, his controlling account and accounts receivable, accounts payable and contractors' accounts, there is one account for each classification in the general ledger in which the totals only are posted. This contractor's account does not reflect the name of the various contractors, it contains only totals.

By Mr. Bershad:

Q. Mr. Barrett, do you know whether any entries were omitted in that book as near as you can ascertain?

A. In what way?

Q. To show his financial condition?

A. His books were in balance.

Q. I did not ask you that; I asked you whether you knew whether any entries were omitted, have you any way of determining that?

A. No.

Q. Do you know whether his books were audited by the Internal Revenue Department?

A. No.

Q. Did you know they sent him a bill, an additional bill for \$1,200?

A. No.

Q. So, therefore, as a matter of fact, you cannot state of your own knowledge whether the figures you have given represent his financial condition as of that date?

[fol. 50] A. I can state they represent his financial condition as shown by the books.

Q. You cannot state from your own personal knowledge whether or not these figures as given by you represent his actual condition whether from the books or otherwise?

A. I know nothing except what his books show.

Q. You have not got inventories here?

A. His book inventory.

By the Master:

Q. Can you state his financial condition according to what book?

A. The general ledger.

Q. Any other books?

A. The other books which are summarized in the general ledger.

Q. Are the other books correctly summarized in the general ledger?

A. To the best of my knowledge, yes.

Q. You checked them up?

A. Yes, a reasonable check.

By Mr. Bershad:

Q. Is it a fact you cannot determine the correct financial condition from any book unless certain closing entries are made in the books?

A. The closings had been made.

Q. Please answer the question?

A. The closing entries would not have to be made.

Q. You would have to have some supplemental figures?

A. Yes, an inventory figure.

Q. That you did not have?

A. It was shown in the books as of December 15th.

Q. Did you have the contractor's inventory book?

A. I don't know about the contractor's books.

Q. You gave me that from the memorandum that appeared in

[fol. 51] the ledger but you did not have the contractor's inventory book, did you?

A. I stated I gave you the contractor's accounts, whether that included inventory or not, I do not know.

Q. Therefore whatever figures you took you assumed these figures were the inventory of the contractor's items?

A. No, I stated plainly the figures are shown on the book, on the general ledger.

By the Master:

Q. There is a whole page for contractor's account?

A. Yes.

Q. There is an item which shows a balance of \$6,114.87?

A. Yes.

Q. The red ink shows less bills of two people, leaving a balance of \$5,017.87?

A. Yes.

Q. Was this entry in there when you got the book?

A. Yes, sir.

By Mr. Bershad:

Q. Mr. Barrett, is it not possible the contractors might have had a lot of finished garments in their possession that had not been billed and returned to the bankrupt?

A. That would not affect their account.

Q. I did not ask you that?

A. It is possible that they did, yes.

Q. You have no way of determining whether the bankrupt did have?

A. I cannot answer the question intelligently.

By the Master:

Q. Did you have such knowledge other than what would appear on the books of the bankrupt?

A. No, sir.

[fol. 52] By Mr. Bershad:

Q. How can you ascertain the financial condition then if you did not know the amount of the garments belonging to the bankrupt in the hands of contractors?

Mr. Cohen: I object to that as already answered.

The Master: Sustained, he has testified as to the financial condition as he found it.

Mr. Bershad: Exception.

Q. Mr. Barreet, in analyzing the statement as drawn up from the figures by yourself and the statements given to the bank on December 15th, there are two items that stand out, the item of mer-

chandise on hand and outstanding accounts, all the other items balance substantially?

A. That is up to Mr. Cohen.

Mr. Cohen: I will concede the machinery and figures vary to the extent of about \$700 and the other two items vary greatly.

Mr. Mershad: Will it be conceded the testimony given by Mr. Barrett is only in regard to the figures taken from the books?

Mr. Cohen: Yes, and he has so testified.

Q. You stated at the last hearing you had some one assisting you on the books?

A. Yes, sir.

Q. I ask what work was done by your assistant?

A. Preparing schedules, accounts receivable and accounts payable.

Q. You did not prepare them yourself?

A. No, sir.

[fol. 53] Q. You relied on the figures as given to you by your assistant, did you or did you not?

A. Yes, I did.

By the Master:

Q. You testified last time that you had gone all over the matter and in general checked up the work?

A. Yes, sir.

By Mr. Bershad:

Q. Item for item?

A. In general.

Q. What do you mean in general?

A. I did not check over every individual item back to the beginning of these books.

Q. I did not say you did.

A. That is what I mean, in general I did check them.

Q. You do not know what extracts your assistant made other than the results he gave you and you used these figures?

A. The work that he did was the subsidiary ledger of which the various accounts receivable, accounts payable, and contractors have control accounts in the general ledger.

Q. You used these figures in making up your statement?

A. I used the control.

By the Master:

Q. So the work you did was of such a nature that if there were any material errors made by your assistant you would have found them?

Mr. Bershad: I object to that.

The Master: Overruled.

Mr. Bershad: Exception.

A. Yes.

Q. How?

A. As I explained before the controlling account of the accounts receivable, accounts payable, and so forth, showed only totals, each [fol. 54] individual item being posted into the customer's ledger and naturally when you make a schedule of the individual accounts it should agree with your summary control in the general ledger.

By Mr. Bershad:

Q. So that if an entry had been made by the bookkeeper in the summary which would agree in the detail, you would not detect that, would you?

A. They agreed with the balance.

Q. Did the balance of the controlling accounts agree with the subsidiary accounts?

Mr. Cohen: I object, the witness has testified the matters he referred to were the figures given by his assistant and that if the figures given by his assistant varied he would know an error was made by his assistant.

The Master: Sustained as to the form.

Mr. Bershad: Exception.

By Mr. Cohen:

Q. Will you please tell the Court how the contractor's accounts are handled in the books?

A. The merchandise is billed to the contractor, he performs the work and bills the goods back to the manufacturer.

Q. How are the entries made in the books to cover these transactions?

A. They had a contractor's account which I referred to; raw material contractor's and a finished goods contractor's account. When material was shipped to the contractor, raw material, the contractor is charged with the raw material and the raw material account is credited; when the goods come back from the contractor, the con-[fol. 55] tractor's account is credited and finished goods are charged and any money paid to the contractor is charged to him and credited to cash.

Q. So that in any particular instance if merchandise was in the hands of the contractors if it did not appear in the inventory of merchandise it appeared as an asset charged against the contractor?

A. Yes, sir.

Q. When you spoke of these items of contractors before you intended to include in that asset either merchandise in the hands of the contractors or an obligation from the contractor to the bankrupt but that you could not determine from the books whether or not the particular item was a charge or represented actual merchandise?

Mr. Bershad: I object.

The Master: Yes, objection sustained.

Mr. Cohen: Question withdrawn.

By Mr. Bershad:

Q. Was it possible from the nature of the accounts as kept for you to determine whether the item of assets you include in your inventory of December 15th, 1919, was actual merchandise in the hands of the contractor or whether it was a debt due from the contractor to the bankrupt?

A. I cannot state that positively without an analysis of each account.

Q. In any event, Mr. Barrett, this item of contractors which you gave the bankrupt credit for is an item which he did not credit himself with in the financial report which is now in evidence, is that no- so?

A. I show it as an asset and he does not.

Q. It is quite possible to owe a contractor and yet the net contractors inventory would still show he owed the bankrupt merchant [fol. 56] dise?

A. He owes either finished goods or money from the goods he got from the principal.

Q. By way of illustration; if \$5,000 worth of merchandise was shipped to the contractor it is charged to him at the profit of the finished garments, that is correct, is it not?

A. I cannot tell how they handled this particular account.

Q. You cannot determine from that how that particular contractor's item was treated by the bankrupt?

A. I can tell in this way; when he charges the contractor with say \$5,000 worth of goods he credits this other account with \$5,000 which is reflected in his profit or loss in due course.

Q. You cannot determine whether that is the price of the finished garments or the raw material.

A. I do not know what you are driving at.

Q. The bankrupt sends goods to the contractor and he charges it to him at the finished price?

A. Yes, and he credits a purchasing account for the same amount.

Q. What did he do in this particular account?

— He credited the purchasing account.

By the Master:

Q. These are the books you used, are they not?

A. Yes.

The Master: Is it conceded these books are all that was kept by the bankrupt.

Mr. Bershad: Yes, sir.

Q. You have examined all these books in making your account?

A. Yes, sir.

Sworn to before me this — day of March, 1922. — — —.

Adjourned to April 7th, 1922, 3:15 P. M.

[fol. 57] Before Hon. Peter B. Olney, Jr., Special Master.

Adjourned Hearing on Specifications

New York, April 21st, 1922—3.30 p. m.

Present: The Master, Mr. Saper, Mr. Bershad, Mr. Lustgarten.

ABRAHAM LUSTGARTEN, the bankrupt, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Bershad:

Q. Can you tell me the name of the people who worked for you shortly before the making of the statement which I show you, yes or no? A. That statement is Trustee's Exhibit, being the financial statement made to the Corn Exchange Bank?

A. I don't remember her name.

Q. How long after December 15th, 1919, did this bookkeeper work with you, and how did she come to leave? Explain to the Referee.

A. She left a few days after December 15th; I couldn't agree with her on the price, and I had to let her go.

Q. I show you this statement to the Chatham & Phoenix Bank, and direct your attention to the item, "Merchandise on hand, \$39,004.97," and ask you to state whether on the 15th day of December, 1919, you [fol. 58] had merchandise on hand amounting to \$39,000?

A. On December 15th, 1919, I had woollens, piece goods to the amount of \$24,721.17. This was taken by the bookkeeper from the stock book. This amount of \$24,721.17 does not represent the complete inventory. The complete inventory amounted to \$30,004.97. The complete inventory included all the merchandise I had on that day in the place, included all piece goods, all linings, all silks, all satins, velvets, mercerized goods, and also included the made up merchandise, consisting of coats, suits, dresses, capes, wraps; it also included all paper boxes, all wrapping paper, and all packing paper and twine and trimmings and buttons and braids, stationery and printing—everything, the value of the merchandise I had in the place, taken at cost price, less discounts amounted to \$39,004.97, the actual amount to the penny.

Q. The item of merchandise of \$24,721.17, as appearing in your books, as testified to by Mr. Barrett, the accountant for the Trustee, what did that represent; what did that include?

A. This included the woolen piece goods only. That was taken from the stock book. The other merchandise we didn't keep no stock books for.

Q. Was it made up or piece goods only?

A. The \$24,000 was piece goods only.

Q. The balance of this amount of merchandise on hand consisted of what?

A. I have explained what the balance of merchandise was.

Q. The Trustee's account showed that your books as of December 15th, 1919, record accounts receivable, \$9,053.25. The statement given to the bank shows outstanding accounts, \$30,642.50. How do you explain this difference, if you can explain same?

A. On December 15th, 1919, I had \$9,053.25 accounts receivable. [fol. 59] I had \$5,071.81 in the hands of contractors. On December 15th, I had about \$6,000 merchandise outstanding with my four salesmen. I had one salesman in San Francisco, one salesman in Chicago, one salesman in Boston, and one salesman in Baltimore. On the 15th day of December, 1919, I had about \$4,000 merchandise outstanding with some of my customers, which was shipped to them on approval. This merchandise was posted in the customers' memo. book; also, the salesmen's samples was posted in the salesmen's memo. book. On the 15th day of December, 1919, in the evening, before we went home, my bookkeeper submitted to me the financial report, showing me and explaining me each and every item separate. She showed me that she had charge slips on her desk for merchandise that was shipped during the day, and a few days prior to that day, to the amount of about \$6,000, which was not charged on account she didn't had no time to charge it, she was busy of working on closing the books. In all the total amount of accounts receivable amounted to \$30,642.50, the actual amount to the penny.

Q. You said the bookkeeper showed you \$6,000 outstanding accounts not posted? Is it \$6,000 or \$16,000—which do you mean?

A. \$6,000. We had about \$6,000 worth of merchandise on the desk—I mean, she had about \$6,000 charge slips on the desk, which was not posted—was shipped to the customers but was not posted. In all, the entire amount, with the merchandise in the salesmen's hands, and with the merchandise to customers that was shipped on approval.

Q. How much merchandise in the salesmen's hands?

A. I explained how much, \$6,000. I had. The four salesmen had [fol. 60] about \$6,000, and about \$4,000 was with the customers, shipped to them on approval, and about \$6,000 was merchandise on the desk, without being charged.

Q. So that, on December 15th, 1919, you had outstanding accounts of how much?

A. On the 15th day of December, I had accounts receivable, \$30,642.50.

Q. As is shown in this statement to the Corn Exchange Bank?

A. The actually amount what it shows.

Q. I direct your attention to the item, "Fixtures, present value, \$1,500," and ask you to state whether on December 15th, 1919, you had fixtures of that value. Explain that item.

A. The fixtures and machinery account.

Q. That's right?

A. I had bought an adding machine and some wooden forms and typewriting machine, which added up the difference between \$848.35 and \$1,500.

Q. During the year 1920, was an audit made of your books by the

Internal Revenue Department of the United States Government, if you know, and was there an additional tax assessed against you?

A. I had a young man that made up the income tax report on the end of February, 1920.

Q. Were the statements which you gave to the Corn Exchange Bank and to the creditors at large and the figures contained in such statements true—yes or no?

A. The statement that I gave to the bank and some of the general creditors was absolutely true statement, to the best of my knowledge.

Sworn to before me this — day of April, 1922. — — —.

[fol. 61] JOSEPH WECHSLER, called as a witness on behalf of the Bankrupt, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Bershad:

Q. What is your business, Mr. Wechsler?

A. I am a public accountant.

Q. And have you been a public accountant for how long?

A. About eight years.

Q. During which time have you had experience in auditing books of various mercantile concerns?

A. I have.

Q. During your experience, have you had occasion to audit books of account of concerns doing business similar to the business of the bankrupt herein?

A. I have.

Q. Are you familiar with the method in which the cloak and suit merchants conduct their business and keep their books?

A. I am.

Q. Did you, sir, at my request, look over the books of the bankrupt in this proceeding?

A. I did.

Q. After looking over the books of the bankrupt in this proceeding, did you make extracts from the said books, and did you make an audit and an examination of some of the items?

A. I did.

Q. State to his Honor what you found after such audit?

A. I found that the books had not been properly closed as of December 15th. It is customary to post all the purchases and sales up to the very end of the year. In this case there was no such posting made. The purchases and sales were not posted from the first of December to the 15th of December, and I noticed some red figures put in later, which was evidently done by some accountant who attempted to close the books some time maybe a year or so [fol. 62] later. From the looks of the books it struck me that the

bookkeeper didn't know how to close them, and may have balled the thing up very badly.

Mr. Saper: I move to strike out the witness's construction of the books, that from the looks of the books it struck him very funny; that is a mere conclusion on the part of the witness.

The Master: I think the motion should be granted.

Mr. Bershad: Just striking out that latter part, giving his opinion?

Mr. Saper: Yes.

The Master: I think he could testify whether or not the books were kept in the manner that such books are customarily kept.

Q. Can you state whether the books were kept in the manner that is customary for books of that kind to be kept?

A. The keeping was all right, but it was the very closing entries that were not quite right—that were not complete, as is evidenced by the figures and marks made by the accountant that went over them.

Q. Did you find as of the 15th day of December, 1919, that the purchases and sales were not posted up complete?

A. They were not posted up complete; that was done for a supplementary period by another accountant.

Q. Did those red lines, as you state, indicate that the books had been closed as of the 15th of December?

A. Possibly, yes.

[fol. 63] Q. Can you state, with that in mind, whether the person who closed those books on that date kept the books accurately?

A. I cannot find out if they were accurate without making an audit, but I can safely say that the books were not properly closed as of that day.

Q. The failure to record the sales and the purchases that would indicate that they were not completed as of the 15th of December; that is correct, was it not?

The Master: I don't think that is what you mean.

A. I mean that by not posting the purchases and sales, it was very evident that the person who did that didn't know their business. It is very evident nobody can deny that.

By the Master:

Q. Do you mean that there were entries left out, from the check books that ought to have been in the cash book or ledger, or whatever it was?

A. Absolutely.

Q. Is that what you mean?

A. They were not entered. The sales and purchases from the first to the fifteenth of the month were not entered in the general ledger in the accounts, before the books were closed. That was done some time later by the accountant who went over the books. They were entered in the ledger, purchase and sales account.

Q. You said they were not entered in the general ledger, didn't you?

A. They were not by the original bookkeeper.

[fol. 64] Q. Where were those entries—were they in the cash book?

A. They were in the books of original entry, like the purchase book, the sales book, but they were not summarized up to the 15th of the month. The bookkeeper continued her work as if nothing had happened, when, as a matter of fact, that was the closing time, and she should have totaled up her purchases and sales to the 15th of the month and made her final entries in the ledger, which she didn't do.

By Mr. Bershad:

Q. Do you know what profit the books showed for the year 1919, or rather, what profit was reported for the income tax purposes, as near as you can?

A. The books, as I recollect, showed a profit of something like \$3,000, or a little over.

Q. What was the profit actually earned by Lustgarten, appearing from all his records, whether from the books or other independent records kept by him for that year?

A. The only other method of figuring it would be the tax report. Now, I saw the tax claim in this office filed by the Trustee—paid by the Trustee.

By the Master:

Q. You don't need to testify as to that.

A. I saw the tax bill, which showed the amount of the taxes paid, which is \$1,284.

By Mr. Bershad:

Q. Did you thereafter examine the source of that, and did you check that up to ascertain how much profit there had been for the [fol. 65] year 1919 in the bankrupt's business?

A. I looked at the tax bill, but I couldn't tell from that what that tax was. I went to the collector's office in Brooklyn and I found that that tax was for the year 1919, and that Mr. Lustgarten's personal exemption being \$2,800, I figured the thing backwards to find he must have reported a profit of about \$16,000 to the Government for the year 1919.

Q. On an amended return?

A. Yes, I was informed that an amended return was filed, that the original return was based on this book profit of \$3,000, and the tax paid on that, and an amended return was made later on, evidently six or seven months, and a profit of about \$16,000 was reported, upon which a tax of \$1,284 was paid in 1921.

Q. Is there anything else that you found on the examination of the books that you think is pertinent to the issue here?

A. Well, nothing that I can think of.

By the Master:

Q. What did you say—that the original profit was shown of \$3,000; is that right?

A. Something like that.

Q. And what was the final profit, as you figure it?

A. As I figured it, the final profit, on the basis of the report, was \$16,000.

Q. And the difference between the \$3,000 and the \$6,000 or about \$13,000, would be based upon the failure to enter up the purchases and sales from the first to the fifteenth of December, 1919; is that correct?

A. Part of it would be there.

Q. That is the only error you found?

A. I didn't audit the books. That was the error that was corrected by the accountant for the Receiver; it was corrected in red ink on [fol. 66] the books, but it convinces me of one thing, that the books were incorrect, and that any statement gotten out of the books would be incorrect, and the only way to prepare a correct statement would be to supplement any information that was missing from the books. It is a condition that is often met when incompetent bookkeepers try to close a set of accounts.

By Mr. Bershad:

Q. From your knowledge and experience as an accountant, in order to make up a final closing statement, can you gather all your data for that purpose from your books merely?

A. No.

Q. Must you, in order to complete your closing inventory, go outside of your books for that purpose—yes or no?

A. You must.

Q. What must you do?

A. Explain to the Referee. It is necessary to obtain a true and accurate inventory of the merchandise that you have title to; that does not mean to say only the merchandise that may be right on the floor; it must include merchandise which is out on consignment, for instance, that may be in the hands of contractors; you must include merchandise that may be in the hands of salesmen; you must include merchandise that is out on memorandum to various customers, and also you must include merchandise accounts, including—there is many a time——

By the Master:

Q. Do you mean to say that in a properly kept set of books, there would not be any entries in any of the books showing what the total [fol. 67] inventory was and what was in the hands of contractors and others?

A. No. The inventory must be obtained by a physical count of every item of stock, no matter where kept; it may be in your own hands or in the hands of others, but as long as you have title to those goods, a physical inventory must be made, in order to determine what the cost of the goods sold has been, or there is no way of ascertaining your condition.

By Mr. Bershad:

Q. In items like trimmings, it is not possible to keep an accurate record of the trimmings, which kept fluctuating day by day?

A. It is possible, by running a perpetual inventory system, but the bankrupt did not do that.

Q. Is it customary for a person in that business to keep a perpetual inventory?

A. It is very unusual to have a perpetual inventory.

Q. That would be the only way?

A. That would be the only way to get it from the set of books or from written figures, what your inventory may be; and even that would be only in case it was kept up from day to day, and was accurately kept. Usually you cannot depend on those written inventories; they are not sufficiently accurate.

Q. So that, it would be impossible to actually determine the condition without going outside of the books?

A. You must go outside of the books; you must take a physical count in order to obtain an accurate inventory.

By the Master:

Q. I take it from what you say that it is impossible to verify a financial statement taken from the books of a man in this line of [fol. 68] business, in most cases; is that right?

A. Yes.

By Mr. Bershad:

Q. And that is the only way it can be done, is by physical count of merchandise which constitutes that part of his assets; is that correct?

A. Yes.

Sworn to before me this — day of April, 1922. — — —.

ABRAHAM LUSTGARTEN recalled:

By Mr. Bershad:

Q. Mr. Lustgarten, did you have a customers' memo. book—yes or no?

A. Yes.

Q. What did that record?

A. The merchandise shipped to the customers on approval.

Sworn to before me this — day of April, 1922. — — —

Adjourned to May 5th, 1922, 3 P. M.

Before Hon. Peter B. Olney, Jr., Special Master

Adjourned Hearing on Specifications

New York, May 5th, 1922—3 o'clock p. m.

Present: The Master, Mr. Cohen, Mr. Bershad, Mr. Barrett, Mr. Lustgarten.

[fol. 69] PERCY F. BARRETT recalled:

Examination.

By Mr. Cohen:

Q. Mr. Barrett, in the testimony given at a previous hearing Mr. Wexler testified there was some red ink figures appearing in the books of the bankrupt indicating the accountant for the Receiver had adjusted some differences at the end of the year 1919; did you or any person working with you enter these readjustment figures that appear there in red ink?

A. No, sir.

Q. Did you find these readjustment figures there when you made your audit of these books?

A. I did.

Q. Now, Mr. Barrett, what is the common understanding in book-keeping terms or auditing terms of accounts receivable?

A. Accounts receivable are moneys due from customers due for goods shipped to them.

Q. When merchandise that is out on memorandum or with salesmen or customers on examination would that be included in the ordinary acceptance of the term accounts receivable among book-keepers?

Mr. Bershad: I object, that is not the subject of expert testimony.

Mr. Cohen: My only purpose in offering this testimony is so that the Court may have something to base an opinion when the Court comes to test the credibility of the witness what testified.

The Master: This particular testimony is addressed to the credibility of the testimony of the witness Wexler?

[fol. 70] Mr. Cohen: Not Wexler, but the bankrupt himself when he gave his explanation of these discrepancies between the books and the statement.

The Master: I will admit the testimony for what it is worth.

A. No.

By the Master:

Q. Under what would you classify goods on memorandum or with contractors for work to be done for the bankrupt?

A. It should be included under a proper heading of goods with contractors or it should be included as inventory as it really is inventory.

By Mr. Bershad:

Q. Is it a fact it is the custom among the cloak and suit people, to charge the merchandise to the contractor at a given figure and therefore that given figure when charged to the contractor would be an account receivable?

A. It would not be an account receivable as is generally known by the term account receivable.

Q. So there is a difference between the ordinary acceptance of the words accounts receivable as they are applied by the ordinary merchants and the way they are used by the people engaged in the cloak and suit business?

A. No.

Q. He charges out the goods to the contractor at a profit on his merchandise, is that right, and that is for convenience to prevent stealing?

A. Yes.

[fol. 71] Q. So the merchant treats it as an outstanding account?

A. Not as an account receivable, he treats it as money due from contractors.

Q. Is that not the same thing?

A. No, sir.

Q. You say he treats that as money due from the contractor?

A. Yes, or goods.

Q. He does not treat it as good since he has made a charge, he has made a charge for the contractor for a specific sum greater than the charge to him?

A. Yes.

Q. Doesn't he regard that as an outstanding account?

A. No, sir.

Q. How would any bookkeeper record that?

A. These goods are shipped out to be manufactured and he so records them, he does not expect money for them.

Q. Naturally in the event of a loss then that becomes an account receivable in the event it is not returned?

A. It all depends on his arrangement with the contractor because many of them insure these goods in the hands of the contractor and title does not pass.

By Mr. Cohen:

Q. Now, Mr. Barrett, what was the capital account of Mr. Lustgarten appearing on his books on December 10th, 1918?

Mr. Bershad: I object to that as not within the specifications as filed.

Mr. Cohen: My only purpose in propounding this question is to show the improbability of the explanation given to Mr. Lustgarten that this discrepancy is due to their failure to include certain [fol. 72] merchandise in the inventory and certain so-called out-standings:

The Master: Overruled.

Mr. Bershad: Exception.

A. \$21,688.19.

By the Master:

Q. What did that include?

A. That is his net worth at that time.

Q. You mean some of the assets less the liabilities?

A. Yes, sir.

By Mr. Cohen:

Q. Now, Mr. Barrett, assuming during the year 1918, Mr. Lustgarten made a profit of \$16,000, what should his capital be at the end of 1918?

A. \$37,688.19.

Q. Does there still appear a discrepancy in these figures at the end of the year 1919 when compared with the financial statement in evidence?

Mr. Bershad: I object as there is no proper foundation laid for a comparison between the 1918 and the 1919 figures.

The Master: You may cross examine.

By Mr. Bershad:

Q. You do not mean to contend if his capital account in 1918 showed \$21,000 that because he shows a profit in the year 1919 of \$16,000 that his net worth should have been around \$37,000?

A. Exclusive of drawings.

[fol. 73] Q. That is your contention?

A. Exclusive of drawings, yes.

Q. Did you take into consideration in December, 1919, the market had risen, did you appreciate that fact?

A. Yes.

Q. Did you also appreciate that six months thereafter the merchandise on his shelves some of it became double the value?

A. That does not enter into this at all.

Q. You are eliminating that entirely from your testimony?

A. I am taking only his figures.

Q. You eliminate that entirely?

A. That has already been absorbed in his figures.

By the Master:

Q. How do you mean that?

A. When he arrived at that profit of \$16,000 that takes into consideration any increase or decrease in the value of the merchandise, that was his profit for the year.

Q. In figuring the capital account, the net worth, as of the end of December, 1918, the stock or merchandise in his inventory at the time would be figured at a certain figure?

A. Yes, sir.

Q. In making up the net worth as of December, 1918, the merchandise on hand would have been inventoried and taken at a certain value?

A. Yes.

Q. Now, assuming that he took stock again in 1918 and being cognizant of the change in prices that he took the same amount of merchandise and carried it at a higher figure because of the rise of price, would that have anything to do with the determination of his net worth in December, 1919?

A. That would be included in his operations for the year which, in this case, resulted in a net profit of \$16,000 and the net profit would be transferred to his capital account.

[fol. 74] Q. You are assuming in arriving at the figures of \$16,000 as a net profit, he has taken into consideration the appreciation in the merchandise he had at both dates?

A. It must be handled that way to show his worth, the net result of his operations was a profit of \$16,000 which was shown in his income tax report to the Government.

By Mr. Bershad:

Q. Do you know his report to the Government would not have required him to give that appreciation since he had a right to take his inventory at the market price or purchase price, whichever was lowest, is that correct?

A. They do it that way.

Q. That is correct, is it not, the law permits him to do it and so, therefore, would it not be fair to assume that \$16,000 was outside of the appreciation profit made, including the amount of money the merchandise appreciated from 1918 to 1919?

A. I am not assuming anything. I am only testifying to the profit he reported, I did not assume anything.

By Mr. Cohen:

Q. Mr. Barrett, the capital or surplus as per the financial statement amounted to \$58,135.89; now, assuming that the entries in Mr. Lustgarten's books are correct on December 10th, 1918, and that his then capital was \$21,688.19, what would that indicate his profits were during the year 1919?

Mr. Bershad: I object, no proper basis has been laid for that computation.

[fol. 75] By the Master:

Q. Including in your profits any appreciation he may have given to his stock in trade?

A. \$36,447.70.

Q. That is the difference between the two?

A. Yes, sir.

By Mr. Cohen:

Q. Now, Mr. Barrett, will you please state the total amount of sales during the year 1919 according to Mr. Lustgarten's books?

Mr. Bershad: I object to that as having no bearing on the issues. The Master: Overruled.

Mr. Bershad: Exception.

A. \$173,893.60.

Q. Mr. Barrett, will you please state the total amount of sales during the year 1920 and up to the time of the filing of the petition in bankruptcy?

Mr. Bershad: Same objection.

The Master: Overruled.

Mr. Bershad: Exception.

A. Sales less returns \$91,256.26.

Q. Now, will you please state to the Court what the loss was in operations during the year 1920 and up to the time of the filing of the petition in bankruptcy?

A. We did not have an inventory at the finish, but assuming his goods had been sold at cost——

Mr. Bershad: I object to any assumption.

[fol. 76] Mr. Cohen: I think that is a very fair assumption in view of the fact its gives the bankrupt every benefit we can give him. However, I will withdraw the question. That is the trustee's case.

Mr. Bershad: I think I will rest with the exception I may want the bankrupt's accountants to clarify some of these questions.

Sworn to before me this — day of May, 1922. — — —

Adjourned to May 12th, 1922, 3 P. M.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

Before Hon. Peter B. Olney, Referee

MINUTES OF FIRST MEETING OF CREDITORS

New York, May 10, 1921—12 o'clock m.

Held at the office of Hon. Peter B. Olney, Referee in Bankruptcy, No. 68 William Street, New York City, pursuant to notice published in the Daily New Record and sent through the mails to creditors. [fol. 77] Appearances: Melville Boyd, Esq., representing Creditors; F. G. Sinclair, Esq., representing the Chatham & Phoenix National Bank; Messrs. Zalkin & Cohen, Attorneys for Creditors and Receiver, Mr. Cohne, of Counsel; Albert Palk, Esq., Attorney for the Corn Exchange Bank, Mr. Mary; Messrs. Lowther & Smith, Attorneys for Bachman & Emmerich, Mr. May of Counsel; Henry H. Kaufman, Esq., Attorney for the American Woolen Company; Abraham H. Cohen, Esq., Attorney for the Bristol Woolen Mills; Abraham Lustgarten, the bankrupt in person.

The Referee: Nominations.

Mr. Boyd: I nominate Mr. Herman Gerdes.

Mr. Cohen: I nominate Mr. Edward J. McGoldrick.

The Referee: What is his address, Mr. Cohen?

Mr. Cohen: 40 Exchange Place.

The Referee: And who do you nominate, Mr. Boyd?

Mr. Boyd: Mr. Gerdes, Herman Gerdes.

The Referee: Now, what is his address?

Mr. Boyd: 225 Fourth Avenue.

The Referee: Who is he?

Mr. Boyd: He is a credit man for Wald & Company.

[fol. 78] The Referee: How many claims have you, Mr. Boyd.

Mr. Boyd: Twenty-two claims, aggregating about \$22,000.

The Referee: File those claims, please.

Mr. Boyd: I will file these claims.

The Referee: Whom do you vote for, Mr. Kaufman?

Mr. Kaufman: I suggest an appointment of three trustees in this case so that there won't be any criticisms. I have just suggested that Mr. Gerdes and Mr. Boyd—

The Referee: Mr. Cohen—

Mr. Cohen: I don't see why that is necessary at all.

Mr. Boyd: I think that three trustees would be rather cumbersome.

The Referee: That is the general experience.

Mr. Boyd: It is the consensus of opinion Mr. Gerdes is an able and energetic man.

The Referee: How many claims have you, Mr. Cohen?

Mr. Cohen: Oh, I haven't got enough to swing the situation. You have passed your vote for Mr. Gerdes. If the gentleman don't see fit to cancel the suggestion I simply withdraw Mr. Gerdes' nomination.

The Referee: Now, the only question about the amount of the bond—what has Mr. McGoldrick on hand, do you know, Mr. Cohen?

Mr. Cohen: He has \$6,800 in cash on hand and the merchandise in his place of business is roughly \$5,000 and there are some outstanding accounts. Now, they place the outstanding accounts at \$10,000. I think a \$15,000 bond would be ample.

[fol. 79] Mr. Kaufman: I think a \$10,000 bond would be enough.

The Referee: What do the creditors say about that?

(Voices of Creditors:) \$10,000.

Mr. Cohen: Mr. Kaufman, the attorney for the bankrupt telephoned a few minutes ago and says he is engaged in a trial up there; the bankrupt is here, but I don't think there is any sense of putting any questions to him.

The Referee: When do you want this to go over to, how about the 18th, or the 19th, which is best?

Mr. Cohen: The Receiver has an order for a sale, but we have been told about an offer of composition—

The Referee: The bankrupt ought to know something about his affairs—do you propose to put through a settlement?

Mr. Lustgarten: I don't hear you.

The Referee: Do you expect to make a settlement?

Mr. Lustgarten: I can't hear a word.

The Referee: Will you write it out, Mr. Stenographer?

(Question written out by the stenographer.)

Mr. Lustgarten: My lawyer will explain you everything.

(The Referee administ-ed the oath, first having the oath written out and having the bankrupt read it.)

Adjourned to May 19, 1921, 2 P. M.

[fol. 80]

New York, May 19, 1921—2 o'clock p. m.

Before Hon. Peter B. Olney, Referee

Adojurned First Meeting

Appearances: Messrs. Zalkin & Cohen, Attorneys for the Trustee, Mr. Cohen, of Counsel; Herman G. Gerdes, Esq., Trustee in Person; The Bankrupt, in Person.

ABRAHAM LUSTGARTEN, the bankrupt, having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Cohen:

(The witness, being deaf, counsel wrote the questions on a piece of paper and submitted them to the witness.)

Q. Is your lawyer going to be here, is Mr. Berchand going to be here?

A. I don't hear you what you say.

Q. Where is your lawyer?

A. He is not going to be here.

Q. Where do you live?

A. I told you he could not attend the meeting today. 217 North Atlantic Avenue, Arverne, Long Island.

Q. Where does your bookkeeper live?

A. I don't know.

[fol. 81] Q. Was your bookkeeper Miss Sanders?

A. The girl was there about ten days?

Q. Is this her address (indicating)?

A. I don't know her address; I suppose that's the right address.

Q. Who was your bookkeeper before Miss Sanders?

A. I had a certain young lady, she used to live in Coney Island and I don't know her name.

Q. Where does Louis Lustgarten live?

A. 217 North—14 West 117th Street.

Q. New York?

A. New York.

Q. How long did Louis work for you?

A. About twelve years, about ten or twelve years.

Q. How old is Louis?

A. I don't know.

Q. About?

A. About twenty-four, twenty-five years old, probably more.

Q. Where does he work now?

A. I don't know.

Q. Is he a married man?

A. He is getting married pretty soon, he is got engaged.

Q. And whom does he live with now?

A. His parents.

Q. What work did Louis do for you?

A. Inside and selling.

Q. Did he help with the books?

A. No.

Q. Who last worked for you outside of Louis and Miss Sanders?

A. I had a few salesmen.

Q. What are the salesmen's names and addresses?

A. One name I remember was Siegel, the other one I don't remember, I don't know their addresses.

Q. Where does Siegel work now?

A. I don't know where he works. Mister, you will have to postpone it, it is impossible. I am not feeling well, I told Mr. Berchand; he told me I can't be examined today; I got terrible pains [fol. 82] in my head, all full of buzzing, I can't get together my thoughts and know what I am talking about.

Q. Have you any money put away in the bank?

A. No.

Q. What is your wife's name?

A. Tillie Lustgarten.

Q. Have you any children, please state their names, ages, and places of residence?

A. I got three children, Felix Lustgarten, eight years old; Helen L., seven years; Hilda, six and a half years—I mean five and a half years.

Q. Did you give your wife any moneys to keep for you before the bankruptcy proceedings were begun against you?

A. No.

Q. Has your wife a bank account?

A. No.

Q. Did she ever have a bank account?

A. I don't know, that I can't tell you.

Q. You drew over \$7,000 from your business in November and December, 1920, and January and February, 1921, what did you do with this money?

A. I can't give you any figures at all, I don't remember anything about figures at all.

Q. Did you draw so much money during those months?

A. I can't give you any names and figures at all, I don't remember any figures at all, I have no idea about the books, about the drawings at all.

Q. When did you stop manufacturing?

A. I don't remember what year it was, about two years, I think.

Q. What were these payments for, I pointed out to you on the accountant's report, cash disbursements charged to labor account, December, \$2,562?

A. I can't tell you about those figures, whether they was charged in the right place or not.

[fol. 83] Q. Who is supporting you and your family now?

A. What is that?

Q. Supporting?

A. I am lending some money.

Q. From whom do you loan money?

A. Some of my friends.

Q. Give me their names and addresses?

A. That is person- affairs, I can't give you, I am taking from a sister, I am loaning four, five hundred or a thousand dollars, I can't give you the name.

Q. What is your sister's name and address?

A. I have so many sisters, I don't — which one to give you the name of, I got seven sisters.

Q. Give me the name and address of the sister from whom you borrowed money?

A. One sister lives across the street from me in the same block, two sisters live there.

Q. Their names?

A. Names?

Q. Yes?

A. One Mollie Lustgarten, one is Jennie Lustgarten.

Q. How much money did Mollie loan to you?

A. I couldn't tell you that, that's private affairs, I can't tell you that.

Mr. Cohen: There is nothing private in this Court; if you don't answer the questions you cannot get a discharge in bankruptcy.

The Witness: This is a private affair, I told you that. I am telling you as much as I know, as much as I can answer.

The Referee: That is not so, that won't do. You can tell him if he don't answer proper questions then I should have to certify to the District Court he was in contempt and they would arrest him and bring him up to Court to know why he didn't answer, and, [fol. 84] after hearing him, if he didn't answer or there was no excuse for answering, they would lock him up. Now, is the last question a proper one?

Mr. Cohen: I think it is.

The Referee: Read it, Mr. Stenographer.

(Record repeated by stenographer.)

The Referee: Now, can anybody make him hear, can you hear me? And they say that no people are so deaf as those who won't hear. Did you ever hear that expression?

The Witness: I didn't hear you.

By the Referee:

Q. None so deaf as those who won't hear, who don't want to?

A. I don't hear you.

The Referee: What was the last question?

Record repeated by stenographer.

The Referee: Well, that manifestly is not so, if he borrowed money from his sisters, he knows approximately how much it is. You have to answer it. You ought to answer that question. What is the question?

Mr. Cohen: As to how much.

The Referee: Put the question in that shape.

Q. How much did you borrow from your sister?

The Referee: When did he say this was?

Mr. Cohen: He is being supported now, he says, by moneys he borrowed; there is a big discrepancy in his affairs as indicated by [fol. 85] an accountant's report, a discrepancy that runs into many thousands of dollars, there is a discrepancy in the merchandise account alone—

The Referee: Has he any attorney?

Mr. Cohen: He has an attorney, Mr. Berchand and Mr. Berchand called me up——

The Referee: Where is he?

Mr. Cohen: He told me he was not going to bother coming, he said he could not see that we could make any headway one way or the other.

The Referee: Well, I think that the question is proper and that the witness should answer it and I will instruct him to answer it on the record; if he don't answer it, I don't see what you can do, except to go on with something else.

Mr. Cohen: Mr. Referee, while your mind is on this case, Mr. Gerdes is the Trustee, and I represent him as counsel. The Receiver has spent a considerable amount of money under an order of the Court to get an accountant's report, but we were limited to the extent of about \$250. It appears from the recommendation of this accountant that there ought to be a further investigation about all the merchandise discrepancies. In submitting his report, he makes this statement: "Before final settlement is made, I recommend that a full and detailed investigation be made of merchandise purchases, the receipt of goods and sales from October 31st, 1920 to February 28, 1921, and a comparison made of inventory of piece goods and finished goods on hand at February 28, 1921." The reason he makes this suggestion is that there is such a large discrepancy in the amount of [fol. 86] merchandise which he had on hand and which he purchased during a given period, and which is not accounted for by his books and by the merchandise on hand at the present time. On account of his alleged physical condition, we cannot see any way we can get at this information except through the help of an accountant, and for that reason I want to ask leave of the Court to permit the Trustee to incur an additional expense in making this investigation; there is a considerable estate here——

The Referee: Well, you want to put that in the form of a petition so as to state the facts, and you ought to state also how much you have paid already for the accountant's services.

Mr. Cohen: All right, sir, I will submit it in the form of a petition.

The Referee: And why — you think it would be wise to do it. Didn't he have a bookkeeper?

Mr. Cohen: He did have a bookkeeper, but it seems strange that the young lady was his bookkeeper for only about two weeks before the bankruptcy intervened and I——

The Referee: Who was the bookkeeper before that?

Mr. Cohen: I have not been able to find out who the bookkeeper was before that.

The Referee: Did you ask him?

Mr. Cohen: Yes, he said he don't know. Now, I will subpoena this last bookkeeper and see whether I can get any information from her, and I will also subpoena some of his former employees, one employee [fol. 87] in particular, a relative of his, and I may get some information here.

The Referee: You see, if it is a fact that this man does not hear anything, while it is a very difficult thing to know what to do with him——

Mr. Cohen: It is a most difficult case to handle.

The Referee: I don't think he even heard me then, because he did not even wink an eyelash.

Mr. Cohen: I do not doubt but that there is something the matter with him.

Mr. Gerdes: The bank tells me that he was slightly deaf, but they had no difficulty in making him hear what they wanted to.

Mr. Cohen: I will present that question to him again and present my application to your Honor for leave to employ an accountant.

The Referee: Yes.

Discussion between counsel and the Referee.

By Mr. Cohen:

Q. Give me the names of all the bookkeepers you have had in your business and tell me where they livê?

A. I never knowed the names and addresses, and they have told me the names and addresses, I can't hear, I could not get the names right.

Q. How long have you been deaf?

A. July going to be four years.

Q. The judge says you must answer the question, so you must tell me how much money Mollie gave you?

A. I can't tell you exactly, I can't remember, one gave me \$50, another one gave me \$50, another seventy-five and I got twenty-five and another gave me seventy-five, that's how I live now.

[fol. 88] The Referee: The substance is that from time to time he got from fifty to seventy-five dollars from these people, that is a substantial answer.

Mr. Cohen: Yes.

The Referee: Do you think he did not get it from them?

Mr. Cohen: Well, if my theory is correct, this story may be a fabrication.

Q. Have you been working for anybody since you are bankrupt?

A. No.

Q. Have you earned any money since the bankruptcy?

A. No.

Q. Does your wife work and earn any money?

A. No.

Q. Do you own the house in which you live?

A. No, sir.

Q. Does your wife own it?

A. No.

Q. Whom do you pay rent to and how much?

A. \$1,100 a year, to Mr. Murray.

Q. Did you pay last month's rent to Mr. Murray?

A. This rent was paid for in four payments, it was paid off till February—till November 1st, is paid off, they don't pay them by the month there, they pay them in four installments.

Q. When did you pay the last installment?

A. Some time in February.

Q. What is Mr. Murray's address?

A. He lives on the same block, I can't tell exactly what his address is. Do you mean the landlord's? Probably about 221 or 223, on the same block.

Sworn to before me this — day of May, 1921. — — —

Adjourned to June 2, 1921, 3 P. M.

[fol. 89]

New York, June 2nd, 1921—3 o'clock p. m.

Before Hon. Peter B. Olney, Referee

Adjourned First Meeting

Appearances: Messrs. Zalkin & Cohen, Attorneys for the Trustee, by Mr. Cohen, of Counsel; Shirley Sandler, a witness.

SHIRLEY SANDLER, called as a witness by counsel for the Trustee, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Cohen:

Q. Where do you live?

A. 221 East 121st Street.

Q. With whom do you reside at that address?

A. My parents.

Q. Do you know Abraham Lustgarten?

A. From working with him.

Q. How long did you work for him?

A. About three weeks.

Q. When did you commence to work for him and when did you quit working for him?

A. I can't remember the exact date.

Q. Were you in his employ when the bankruptcy proceedings were commenced against him?

A. Yes, sir.

Q. Do you remember the Receiver coming into the place?

A. Yes.

Q. Do you remember the day when the Receiver came into the place?

A. I don't.

[fol. 90] Q. Do you remember assisting Mr. Lustgarten to get certain paper?

A. Yes.

Q. And you gave him certain information?

A. Yes.

Q. How long have you been a bookkeeper?

A. About five years.

Q. Before you worked for Lustgarten where were you employed?

A. L. Wohl & Co., 395 Fourth Avenue.

Q. How did you happen to get a position with Mr. Lustgarten?

A. Through an agency.

Q. Had he advertised?

A. He had advertised, I understand, and then this agency had written to me and that is how I got the position.

Q. Now, when you came to his place of business the first time did you find any bookkeeper there?

A. No, she had left.

Q. Do you know who his bookkeeper was before you?

A. No, I don't.

Q. Did you ever see her?

A. No.

Q. Did you ever hear of her name?

A. No.

Q. Who was employed by Mr. Lustgarten besides yourself at his place of business at 149 West 26th Street during the three weeks that you were there?

A. Louis Lustgarten.

Q. What were his duties?

A. Oh, he was a sort of general manager and salesman, he took care of the entire place.

Q. Are there any other employees besides you and Louis Lustgarten?

A. No, there was a salesman, only one that I know of, a commission salesman.

Q. Was he in the place of business constantly?

A. Why, I never saw him.

Q. What was the name of this salesman?

A. I don't remember.

[fol. 91] Q. Now, when you came to the place of business were the books kept regularly?

A. No, he was supposed to give me a new set of books; that was the only condition that I started to work there, the books were jumbled horrible.

Q. Did you make very many entries in the books during the three weeks that you were there?

A. Very little, I just made up the few charges, that was all.

Q. Now, what charges did you make; for merchandise going out?

A. Yes.

Q. Who had charge of the shipping?

A. Louis Lustgarten.

Q. And how would you know that merchandise went out?

A. By the charges that I made.

Q. And who gave you the information to make the charge?

A. Louis Lustgarten.

Q. Aid did you ever know of Louis Lustgarten sending out merchandise without instructing you to make the charge?

A. Never.

Q. Do you mean you don't know if he did?

A. The charge was made and given to me.

Q. Did you have any difficulty in getting along with Mr. Abraham Lustgarten on account of his deafness?

A. Yes, sir.

Q. Could you make yourself heard by him?

A. Yes, sir.

Q. He understood what you said when you spoke to him?

A. Yes, sir.

Q. Did you ever find it necessary to put your remarks down in writing?

A. Once in a while; according to the weather.

Q. Did you ever notice anything else wrong with him outside of the fact that he was deaf?

A. Outside of the fact that he was very nervous.

[fol. 92] Q. Did he ever give you instructions to make any entries in the books?

A. Yes.

Q. What instructions, for instance?

A. Well, notes that came payable and well—certain bills would become payable.

Q. Did Mr. Lustgarten do any manufacturing in his place of business?

A. Not while I was there.

Q. Well, he didn't have the plant for manufacturing in his place of business, did he?

A. Nothing, only jobbing.

Q. Do you know whether he sent out any merchandise to be manufactured?

A. Well, he had contractors.

Q. Do you know who the contractors were?

A. I am not sure, but all I know one was Berger. While I was there lots was coming in, but nothing was taken out.

Q. Wasn't any merchandise taken out during that time to contractors—

A. Nothing at all.

Q. Did you ever have a book in which you entered merchandise sent out to contractors?

A. I saw a book, but I never made any entries in it.

Q. Who was supposed to have charge of that merchandise?

A. Louis Lustgarten.

Q. Was there a cutting table there?

A. There was.

Q. Have you ever seen a cutter working there?

A. Never.

Q. Did you understand under what condition the merchandise went out to contractors?

A. Well, in piece goods.

Q. Never cut up?

A. Never cut up, that I know. The time I got there he had just moved into the place.

Q. Was it during the month of February of this year that you worked for Lustgarten?

A. Yes.

[fol. 93] Q. Are you employed at the present time, Miss Sandler?

A. I am.

Sworn to before me this — day of —, 1921. — — —.

Adjourned to June 8th, 1921, 11 A. M.

Before Hon. Peter B. Onley, Referee

Adjourned First Meeting

New York, August 11, 1921—10 o'clock a. m.

Present: The Referee, Mr. Cohen, Mr. Bershad, The Bankrupt, in Person.

(The witness, being deaf, the questions were propounded in writing.)

ABRAHAM LUSTGARTEN, recalled:

Direct examination.

By Mr. Cohen (continued):

Q. Mr. Lustgarten, did you keep books in your business?

A. Yes.

Q. Are you familiar with the books that were kept?

A. Very little.

Q. Did you instruct your various bookkeepers what entries to make in those books?

[fol. 94] A. I instructed them to pay bills, notes, post the bills when they came in.

Q. Did you ever have an accountant go over the books for you?

A. About five, six years ago; since then I hadn't had any.

Q. How do you know if your bookkeeper was keeping the books correctly?

A. I never knew that.

Q. Did you ever examine the entries in the books that your book-keeper was making?

A. Never did.

Mr. Cohen: Will you please mark this book.

Book referred to received in evidence and marked "Trustee's Exhibit 1, August 11, 1921."

Q. I show you book which the stenographer has marked Exhibit 1, please state what that book is?

A. Check book.

Mr. Cohen: Will you mark this one.

Book referred to received in evidence and marked "Trustee's Exhibit 2, August 11, 1921."

Q. I show you a book which the stenographer has marked Exhibit 3, please state what that book is?

A. I don't know what they call that book.

Mr. Bershad: It looks like a ledger, I think.

Q. Look over this book, Exhibit 3, carefully.

A. I looked, but I don't know the name of the book, what they call that book; I don't know exactly what the book is supposed to be called.

[fol. 95] Q. See page 5, with the name Max Berger & Co., what business did you do with Max Berger?

A. He was manufacturing for me, coats and suits.

Q. See page 15, Wolinsky & Schwartz?

A. This made for me coats and suits, too.

Q. See page 16, 17, S. B. S. Co. and W. B. Dress Co.?

A. This also made dresses.

Q. Look at all the other names in the book, don't that show that this was contractors' account book or ledger?

A. I presume it is sub-manufacturers' book, not a contractors' book.

Mr. Cohen: Mark this, please.

Book referred to received in evidence and marked "Trustee's Exhibit 4, August 11, 1921."

Q. I show you a book which the stenographer has marked Exhibit 4, please state what that book is?

A. According to what it is marked outside on the page, General Ledger.

Q. Look inside.

Mr. Bershad: Complete your question.

A. That must be a general expense ledger, something like that, commission sales.

Mr. Cohen: Mark this book, please.

Book referred to received in evidence and marked "Trustee's Exhibit 5, August 11, 1921."

Q. I show you a book which the stenographer has marked Exhibit 5, please state what that book is?

A. I don't know what that book is called—a sales book, sales [fol. 96] commission book, here, where I find these names here.

Mr. Cohen: Mark that one.

Book referred to received in evidence and marked "Trustee's Exhibit 6, August 11, 1921."

Q. I show you a book which the stenographer has marked Exhibit 6, please state what that book is?

A. Whatever it is marked outside, it's a cash book.

Q. Did you keep a petty cash book?

A. No.

Q. Did you keep a payroll book?

A. I kept a petty cash slip system.

Q. Did you keep a payroll book?

A. Yes.

Q. Where is that payroll book?

A. It remained in the place.

Q. When did you see the payroll book, last time?

A. I never seen that payroll book.

Mr. Bershad: Wait a minute, let me get that question for him.

By Mr. Bershad:

Q. You are asked, when did you see it last time?

A. I couldn't remember since a year or two ago, I never went over the safe and looked at the books.

By Mr. Cohen:

Q. What became of the slips for the payroll?

A. They remained in the place of business.

Q. Between December 11th and December 22nd, 1920, there is charged to labor account in your books \$2,562, to whom was this money paid?

A. To contractors.

[fol. 97] Q. Who were the contractors?

A. By the name of Joe Patchef.

Q. What is his address?

A. I don't know his address, he had his place of business in Brooklyn.

Q. Where in Brooklyn?

A. I think he told me—I don't remember, I think in Flatbush Avenue.

By Mr. Bershad:

Q. How did you get him?

A. Through advertisement.

Q. You advertised?

A. I advertised in the New York Times for contractors.

Q. And he came in answer to one of the ads.?

A. He came in answer to my ad.

By Mr. Cohen:

Q. Is his name in the contractors' or manufacturers' book?

Mr. Bershad: If he knows.

A. I don't know what book he is in, I presume he is in the payroll book, he wasn't a sub-manufacturer, he was a contractor.

Q. Will you please show me in your books where there were charges made, either to labor or petty cash, before November 18, 1920; your bookkeeper, Miss Sandler, says that the charges which were made to labor and to petty cash should have been charged to office and shipping salaries?

A. If I would know bookkeeping, I would show you. Miss Sandler, I don't think she knew what she was talking about, she was the end of February there, I started paying labor about the middle of January.

[fol. 98] By Mr. Bershad:

Q. How long was she with you?

A. About two or three weeks, the end of February.

By Mr. Cohen:

Q. According to your books, the cash disbursements between November 1, 1920, and February 28, 1921, amounted to \$11,706; the items comprising this amount are charged to labor account, petty cash, and to office and shipping salaries; according to your books, all you paid to Miss Sandler and to Louis Lustgarten, your nephew, was \$1,054, this left a balance of \$10,652; what happened to this balance?

A. Every check that was drawn is made a record in the cash—in the check book, the stub of the check book for what purposes and who got the money.

Q. Look at Exhibit 2, check No. 15,336, payroll \$225, where does it show on the stub who received this money?

A. It says payroll, marked payroll, from this I suppose was posted in the other books.

Mr. Cohen indicates to the witness entry in exhibit, page 45, under date of February 25th, payroll \$225.

The Witness: \$225 was payroll for the inside help, myself and the inside help.

Q. Please name the inside help to whom you paid this \$225, and how much to each one?

A. Louis Lustgarten, the bookkeeper, and myself, and the last two weeks in February or three weeks in February I didn't had any help, the last man left me the first week in February.

[fol. 99] Q. (Counsel indicates question again.)

A. The bookkeeper and my nephew and myself.

Q. (Question indicated again.)

A. Louis Lustgarten got \$40, and the bookkeeper got \$23. \$100 a week I give my wife, \$62 I got, my spending money.

Q. I show you check 15,337, "Expenses, \$1,000," what was that for?

A. \$300 I gave Mr. Bershad, \$275 I got rent, \$60 about I paid my housekeeper, I paid a man for coals \$64, I paid my wife's bills, doctor's bills, that's how all the thousand was spent.

Q. I show you check 15,330, payroll \$225?

A. That's for the week before.

Q. How was that paid out?

A. The same, \$225, the same thing as the week before, my nephew and the bookkeeper and myself and my wife.

Q. Check, February 5th, \$160?

A. Was paid to the bookkeeper and my nephew, and I had a shipping boy there, this \$160 was paid to my nephew, the boy I had there and Louis Lustgarten and my wife, the same day.

Q. Check No. 15,317, general expenses \$150?

A. Moving expenses.

Q. Check 15,316, payroll \$375?

A. January 29th I had about — salesmen to pay out, shipping boy and the bookkeeper, my nephew, myself and my wife, that's all.

Q. According to your books, in the year 1917 you drew only \$1,455.78; in 1918, \$3,911.69; in 1919, \$3,838.56; 1920, up to October 31, 1920, you drew \$3,614.42, and from November 1, 1920, to your bankruptcy, you withdrew \$5,939.03, will you please explain why, in the period of four months you withdrew so great an amount immediately prior to your bankruptcy?

A. Maybe, it's right, I don't believe it, I don't believe if its right.

[fol. 100] By Mr. Bershad:

Q. What are you talking about?

A. This \$146 here, how can a man live on \$1,400 a year?

Q. You mean in 1917?

A. Twenty-five dollars my pocket money at that time? How can I live on \$1,400, Mr. Bershad, \$25.00 a week?

Q. (Question shown witness again.)

A. I never drew \$5,939 for myself.

Mr. Bershad: His answer is that that money that appears to have been drawn was used for labor and contractors and for the conduct of the business and for moving.

By Mr. Cohen:

Q. What did you do with cash amounting to \$11,706, which you withdrew from this business from November 1, 1920, to February 28, 1921?

Mr. Bershad: You better reframe that question.

Mr. Cohen: Let him answer it the best way he can.

By Mr. Bershad:

Q. Did you ever draw that for yourself?

A. November, my books shows—the books shows what this money was spent for, I never drew \$11,706 to my account.

Q. It was drawn for the conduct of the business and for contractors?

A. It was drawn for the conduct of the business and to contractors.

[fol. 101] Mr. Cohen: Witness is shown a report of Louis C. Goetting, dated March 17, 1921, at page 2, under heading of "Cash Disbursements," amounting to \$11,706.

Mr. Bershad: What is the question, Mr. Cohen?

The Witness: The books shows what it is for, whatever is charged to labor was charged to labor, what is charged petty cash is charged petty cash.

By Mr. Cohen:

Q. Does this seem to be correct?

Mr. Bershad: What does he know about that?

A. I can't tell whether they are correct or not, probably it was not posted to the right place, you know what I mean, probably it was supposed to be posted to labor and was posted to office, probably it was supposed to be posted to office and charged to labor, this I never knew, whether it was kept right or not.

Q. Is it possible that from November 1, 1920, to February 28, 1921, you drew \$7,859 for office and shipping?

A. It wasn't charged right, it was supposed to be charged to labor.

By Mr. Bershad:

Q. That was during the strike period and Patchef was working for you, your contractor; was he doing work for you?

A. There was no strike in the cloak business since three years [fol. 102] ago, but this contractor done work for me since October till the end of January.

Q. 1920 to 1921?

A. Yes.

By Mr. Cohen:

Q. Wasn't your labor charged to manufacturing and contractors?

A. This one, the book what we seen before is sub-manufacturers: the other man done work for me as a contractor, this is what we call indirect labor, these people they manufacture for jobbers and they manufacture on their own hook.

Q. Who were your contractors between November 1, 1920, and February 28, 1921?

A. Joe Patchef.

Q. Why is there a special charge to labor December 11th, 14th and 22nd, \$2,562?

A. There is no special charge.

By Mr. Bershad:

Q. The goods that Patchef made up for you, and for which you paid him from the items of labor appearing, did you have a good part of them in your place when the Receiver took charge of your factory?

A. A good many of these garments was in the place and a good many was sold during the time.

By Mr. Cohen:

Q. Is Louis Lustgarten your nephew?

A. Yes.

Q. When did you first employ him?

A. About nine or ten years ago.

Q. Did he have a written contract with you?

A. Verbal contract.

[fol. 103] Q. What were the terms of his employment by you?

A. During 1919 he was getting fifty dollars a week, he drew thirty and twenty remained for saving purposes; during 1920 he was getting sixty dollars a week; he drew forty and twenty remained for saving purposes; I told him, "Any time you will need your money you can have it, if it is a good cause, I will give it to you;" during the month of December, 1920, he got engaged; he asked me — I should give him the money, and I gave it to him.

Q. Why doesn't the name of Louis Lustgarten appear in the salesman's commission book?

A. The only amounts that appear in the salesman's commission book that is that work for commission only; he wasn't a commission man, he was a salaried man.

Q. Have you any entry in any book of an account with Louis Lustgarten?

A. It must be some entry when they got out the Two thousand dollars; it must be entered in some book.

Mr. Cohen: I will close the first meeting.

Sworn to before me this — day of August, 1921. — — —

Peter B. Olney, Referee.

Hearing closed.

[fol. 104] EVIDENCE: TRUSTEE'S EXHIBIT 1—May 17, 1922

Statement of Financial Condition

Name, Abraham Lustgarten.
 Business, Mfg. Coats, Suits.
 Address, 8-10 West 19th Street.

For the purpose of obtaining loans from the Corn Exchange Bank, of New York City, I the undersigned, namely Abraham Lustgarten, make the following statement of my financial condition, and represent that the said statement is true and correct of my own knowledge, and that it truthfully sets forth all my assets on the 15th day of Dec. 1919, and all my liabilities of every kind and nature whatsoever, for which I the undersigned, was obligated directly or indirectly on said date and Abraham Lustgarten, the undersigned make (s) such statement after a personal examination of the merchandise on hand on said date as well as the books maintained and kept by me in the regular course and conduct of my business, which books show all of the transactions on which the following statement is based.

This statement is to be regarded by Abraham Lustgarten and by The Corn Exchange Bank as continuous and binding, and to form a true statement as to the assets and liabilities of the undersigned, and other matters, to be relied upon by the Corn Exchange Bank upon application by the undersigned, for all loans until another statement in writing shall be substituted for this, or this statement recalled.

[fol. 105]

Assets

Merchandise on hand (@ cost)	\$39,004.97
Accounts outstanding, due from customers, all good...	30,642.50
Other accounts outstanding, all good	None
Bills receivable	None
Cash on hand	945.63
Cash in the following banks:	
Corn Exchange	6,319.31
Chatham & Phoenix	2,723.48
Fixtures, present value	1,500.00
Real Estate, assessed value	None
Total assets	\$81,135.89

Liabilities

For merchandise on open acct	\$3,000.00
Borrowed from banks	20,000.00
Total liabilities	\$23,000.00

Net worth is at least \$58,135.89.

I have not pledged, hypothecated or assigned any outstanding accounts or merchandises, or mortgaged any merchandise, stock or fixtures as security for loans or advances, or for any other purpose.

— contingent liabilities are:

Accommodation endorsements.....
Bills receivable under discount.....
Surety on bonds or undertakings.....
All other contingent liabilities.....
Contingent liabilities of individual partners not included above.....

None

Amount of sales of my business for the year ending the 15th day of Dec. 1919, were.....	\$175,000.00
I carry fire insurance policies in the amount of.....	42,000.00

[fol. 106] I have other bank ac-ounts at Chatham & Phœnix.

At the date of signing this statement my capital is not less than as above stated. And it is hereby agreed that in the event that at any time The Corn Exchange Bank shall find the foregoing statement untrue in any particular, or in case of the failure or insolvency of the undersigned, or in case a petition in bankruptcy be filed by or against the undersigned, or a judgment be recovered against the undersigned in a court of record, or upon pledge and transfer of accounts receivable by the undersigned, or a general assignment be made by the undersigned for the benefit of creditors, or in case at any time the net worth of the undersigned is substantially less than as above stated, all loans and obligations of the undersigned held by the said bank shall become immediately due and payable. And further, whenever my financial condition is changed materially from the financial condition shown in the above statement, I agree to notify the said bank at once of such change, whether applications for further loans are made or not. And it is further agreed that, upon failure to notify said bank as aforesaid, or in the event of such change in financial condition, all loans and obligations of the undersigned held by the said bank shall at its option, become immediately due and payable.

Dated, Jan. 5, 1920.

Abraham Lustgarten. Witness: Hyman Josephson.

This statement was delivered to The Corn Exchange Bank, Fifth Avenue Branch, by Mr. Josephson, representing Abraham Lustgarten and was received by C. A. Ingalls.

Date, 1/6/20; Hour, 1:15 P. M.

In the Matter of LUSTGARTEN

The recent case of B. & L. Glove Corp., is not to be interpreted (in my judgment) as holding that mere lapse of time take away all right to rely upon a borrower's or buyer's financial statement.

It does hold that a man cannot under all circumstances and for any period of time continue to rely upon such a piece of paper.

The determining issue in the Glove Co. case was the proven financial condition of the business community at the time then in question. Thus, the questions are of fact, and are, did the creditor actually rely on the financial statement, and, under the circumstances, shown, did he have a right so to rely?

In my judgment, if a man gives to a Bank from whom he regularly borrows, a statement which contains (as the commissioner finds this one did) that it was a continuing statement and that the borrowee would notify the Bank at once of any material changes in his exhibited financial condition,—upon such a statement, the Bank has a right to rely until such notice is given. That is the very bargain between the borrower and lender.

I am, therefore, compelled to disagree with the Commissioner in respect of a matter of financial statement.

But further I am of opinion that the specification alleging failure to keep proper books are upheld.

The bankrupt maintains that he really owed shortly before his failure, \$2,000 to his nephew, who had been in his employment. [fol. 108] Such a debt was by no means trifling considering the extent of this bankrupt's business and his available assets. The existence of the debt made a material difference in his net assets.

No trace of the debt is found in his books, and no excuse is given for such omission.

There was a failure to keep proper books and the intent necessary by the statute is one of reasonable inference.

The appropriate provision of law is "intended to insure the keeping of correct and complete accounts (and) should be rigidly enforced" (re Hanna, 168 Fed., 238). The case cited by the creditors In re Kollie, 22 A. B. R., 515, is apposite.

Let a discharge be denied.

Sept. 22, 1922.

C. M. Hough, C. J.

[fol. 109] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

Now, on this 13th day of October, 1922, comes Abraham Lustgarten, Bankrupt herein, by his attorney, Laurence J. Bershad, and says that the order, judgment or decree dated October 6th, 1922, in this proceeding, denying the Bankrupt herein his discharge, and failing to confirm the report of Special Commissioner Hon. Peter B. Olney, Jr., is erroneous and against the just right of the said Abraham Lustgarten, for the following reason:

First. That the Court erred in denying the Bankrupt herein his application for a discharge.

Second. That the Court erred in reversing the findings and conclusions of the Special Commissioner on the questions of fact found by the said Special Commission, viz: That the objecting creditor relied on the financial statement of Abraham Lustgarten as of inventory of December 15th, 1919, and that the Court erred in finding as a question of fact that the said statement as of December 15th, 1919, was false, and was given by the Bankrupt to the objecting [fol. 110] creditor for the purpose of obtaining credit thereon, and that the Court erred in finding as a question of fact that the objecting creditor did as a matter of fact rely upon the said financial statement in extending credit to the Bankrupt herein, and that the Court erred in finding as a question of fact that the payments to Louis Lustgarten were fraudulent transfers.

Third. That the Court erred in reversing the conclusions and findings of the Special Commission in that the objecting creditor has failed to establish all the specifications of objection as filed, in that the Bankrupt herein has failed to keep proper books of account, with the fraudulent intent to conceal his true condition from his creditors.

Fourth. That the said Court erred in reversing the findings of the Referee on the questions that the Bankrupt who was physically infirm, did not have any control over, nor did he himself keep the records in his books of account.

Fifth. That the Court erred on the question of fact that the said records and books of the Bankrupt were kept by the employees of the Bankrupt with whom the Bankrupt was unable by reason of his physical infirmity to keep in touch, and over whom he therefore did not have the control that was necessary to establish the intent to conceal his true financial condition, or to suppress same from his creditors.

Sixth. That the Court erred in failing to confirm the report of the Special Commissioner recommending the discharge of the Bankrupt herein.

[fol. 111] That the said Abraham Lustgarten prays that the said judgment, decree or order may be reversed and that the report of the Special Commissioner be sustained and confirmed; that the Court will allow an appeal herein from said judgment, decree or order and will approve the bonds for the stay of all proceedings under the order appealed from, extending such appeal and your petitioner will ever pray, etc.

(Sgd.) Abraham Lustgarten. Laurence J. Bershad, Attorney
for Abraham Lustgarten, Bankrupt.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW
YORK

[Title omitted]

NOTICE OF APPEAL

SIR:

Please take notice that Abraham Lustgarten, the Bankrupt herein, hereby appeals to the United States Circuit Court of Appeals, for the [fol. 112] Second Circuit, from the order, judgment or decree made herein on the 6th day of October, 1922, by Judge Learned Hand, wherein the said order denies the bankrupt herein his discharge, and fails to confirm the report of Special Commissioner Hon. Peter B. Olney, Jr., recommending the discharge of the Bankrupt herein, and said Bankrupt hereby appeals from each and every part of the said order.

Dated, New York, Oct. 13th, 1922.

Yours, etc., Laurence J. Bershad, Attorney for Bankrupt and
Petitioner, Office & P. O. Address, 291 Broadway, N. Y.
City, Manhattan Borough. No Herman Gerdes, Esq.,
Trustee for all Objecting Creditors, 225 Fourth Avenue,
New York City, Manhattan Borough; Zalkin & Cohen,
Esqs., Attorneys for Trustee and Objecting Creditors, 51
Chambers Street, New York City, Manhattan Borough.

Appeal allowed. — — —, U. S. D. J.

[fol. 113] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

[Title omitted]

ORDER DENYING APPLICATION FOR DISCHARGE

An application having been made by Abraham Lustgarten for a
discharge herein and appearances having been filed by the Corn Ex-

change Bank of New York City, Rusch & Co., Chatham & Phoenix National Bank, Warren Woolen Co., American Woolen Co. and S. B. Kafka in opposition to said discharge, and thereupon specifications of objections having been duly filed, and such specifications having been referred to Peter B. Olney as Special Master, to ascertain and report the facts with his opinion, and thereupon an order having been made directing Herman G. Gerdes, trustee in bankruptcy herein, to prosecute said specifications at the expense of the bankrupt estate, and he having thereupon appeared in support of said specifications, and such Special Master having filed his report dated July 31, 1922, recommending that the specifications of objections be overruled and the petition for discharge granted; and thereupon the bankrupt having come on to be heard,

Now, after hearing Laurence J. Bershad, Esq., attorney for the [fol. 114] bankrupt, in support of said motion to confirm, and Zalkin & Cohen, attorneys for the trustee, in opposition thereto, it is, on motion of Zalkin & Cohen, attorneys for the trustee in bankruptcy herein,

Ordered, that the said motion to confirm, be and the same is hereby denied; and it is further

Ordered, that the application for discharge of the said Abraham Lustgarten, bankrupt, be and the same is hereby denied; and it is further

Ordered that the fees of the special commissioner be and the same hereby are fixed in the amount of \$— and that the charges of the stenographer Herman Parkus, be and the same hereby are fixed in the amount of \$6.00; and the trustee of the estate of the above named bankrupt, is hereby directed to pay the same.

Dated, October 6, 1922.

L. H., U. S. D. J.

[fol. 115] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK

In Bankruptcy

No. 29252

In the Matter of ABRAHAM LUSTGARTEN, Bankrupt

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, October 20, 1922.

Zalkin & Cohen, Attorneys for Trustee. Laurence J. Bershad,
Attorney for Bankrupt.

[fol. 116] UNITED STATES OF AMERICA,
Southern District of New York:

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 20th day of October, in the year of our Lord one thousand nine hundred and twenty-two, and of the Independence of the said United States the one hundred and forty—

Alexander Gilchrist, Jr., Clerk.

[fol. 117] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT

[Title omitted]

Before Rogers, Manton, & Mayer, Circuit Judges

OPINION, MAYER, J.

Appeal from an order of the District Court for the Southern District of New York denying the motion to confirm the report of a Special Master and denying the application for discharge of Lustgarten, the bankrupt.

The specifications of objection to bankrupt's petition for discharge were predicated upon four grounds, to wit: (1) a failure to keep proper books of account; (2) the giving of a false financial statement; (3) fraudulent concealment of \$2,000 from the trustee in bankruptcy; and (4) the making of false oath in the bankruptcy proceedings.

The Special Master in his report, however, stated that the only specifications on which testimony was introduced before him were those numbered (2) and (3) *supra*.

He reported that the specifications were not established and recommended discharge. The District Court apparently disregarded specification (3) but sustained specifications (1) and (2) *supra* and [fol. 118] denied discharge.

Laurence J. Bershad, for Appellant.

Zalkin & Cohen (Moses Cohen, of Counsel), for Trustee.

MAYER, Circuit Judge:

Specification 3 involved a question of fact, the details of which we need not discuss.

The Special Master held that specification 3 was not proved and that specification was properly disregarded by the District Court. The other two specifications rest on different facts and must be separately considered.

Specification 2. Under date of January 5, 1920, Lustgarten gave The Corn Exchange Bank a written statement of his financial condition, as of December 15, 1919, "for the purpose" as in the statement set forth "of obtaining loans" from the bank. The statement also provided:

"This statement is to be regarded by Abraham Lustgarten and by The Corn Exchange Bank as continuous and binding, and to form a true statement as to the assets and liabilities of the undersigned, and other matters, to be relied upon by The Corn Exchange Bank upon application by the undersigned, for all loans until another statement in writing shall be substituted for this, or this statement recalled. * * *

And further, whenever my financial condition is changed materially from the financial condition shown in the above statement, I agree to notify the said bank at once of such change, whether applications for further loans are made or not."

Under the headings of "Assets" and "Liabilities" the bankrupt [fol. 119] set forth various details. Only two of these are attached (the others being concededly correct), namely "Merchandise on hand (@ cost)—\$39,004.97" and "Accounts outstanding, due from customers, all good—\$30,642.50."

An expert accountant who examined the books testified that these items should have been \$24,721.17 and \$9,053.28 respectively.

The point of this testimony was that the accountant found that the figures from the books showed a net surplus of \$23,1258.43, whereas the statement of the bankrupt to the bank showed a net surplus of \$58,135.89.

The bankrupt insisted that he had the merchandise and accounts receivable in the amounts set forth, but that, owing to faulty book-keeping, these amounts did not appear in the books. This question of fact, however, was not passed upon by the Special Master because he relied upon *In re B. & R. Glove Corp.*, 279 F. R. 372.

We are unable to distinguish the facts in the case at bar from those in the case just cited. The nature of the statement is substantially the same. In the case at bar, the lapse of time between the date of the statement and the obtaining of the loan was nearly ten months, i. e., from January 4, 1920 to October 29, 1920, while in the *B. & R.* case, the time was about six months, i. e., from June 2,

1920 to December 10, 1920. Both periods were in the same year in respect of which general financial conditions are discussed in the B. & R. case.

In the case at bar, it is doubtful on the testimony whether it can be said that the bank relied on the bankrupt's statement; but, in any event, as pointed out by Judge Rogers in the B. & R. case, the bank was not justified in relying upon the statement.

[fol. 120] Specification 1. This specification seems not to have been relied upon before the Special Master, but apparently was urged before the District Court. The bankrupt testified that his nephew had been in his employ for about nine or ten years and that beginning in 1919, the nephew's salary was \$50.00 per week of which he drew \$30.00 and left with the bankrupt \$20.00 for savings purposes. In 1920, his compensation was increased to \$60.00, he drawing only \$40.00 and leaving the remaining \$20.00 with the bankrupt for the same purpose. In December 1920, the nephew became engaged to be married and requested his uncle to pay him the amount thus retained and this amount was paid. The accountant who was a witness on behalf of the trustee testified that in the bankrupt's general ledger under the heading "Commission on Sales," on December 8, 1922 there was an entry of \$1,000.00 as having been paid to the nephew, Louis Lustgarten and on December 22, 1922, \$1,000.00, which was posted from the cash book. Thus there was no concealment whatever of the payment of these amounts to the nephew. There is no proof that the bankrupt was insolvent in December 1920 and, as pointed out by the Special Master, the trustee did not call the nephew or any other person to show that, in any manner, the transaction was not genuine. The most that is argued is that the books did not contain credit entries to offset these debits. Accurate bookkeeping would have required a proper credit entry of \$20.00 weekly,—a small amount as compared with the volume of business of the bankrupt. In the statement to the bank, the liabilities for merchandise and bank accommodations are carefully and accurately set forth; and the failure to note these small credit entries we think was due to inadvertent faulty bookkeeping and not to any [fol. 121] intent to conceal financial conditions.

We are satisfied from the record that the trustee failed to adduce proof to show that the bankrupt intended to conceal his financial condition by failing to make these credit entries of \$20.00 weekly and such intent must be proved to bar a discharge under Section 14 (b) (2) of the Bankruptcy Law.

The order is reversed with costs and the District Court is instructed to grant a discharge to the bankrupt.

[File endorsement omitted.]

[fol. 122] At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 2nd Day of April, One Thousand Nine Hundred And Twenty-three

Present: Hon. Henry Wade Rogers; Hon. Martin T. Manton;
Hon. Julius M. Mayer, Circuit Judges.

[Title omitted]

JUDGMENT

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed with costs and the District Court is instructed to grant a discharge to the bankrupt.

H. W. R.

M. T. M.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

[fol. 123] [File endorsement omitted.]

[fol. 124] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 124 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of Abraham Lustgarten, Bankrupt-Appellant, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 7th day of May, in the year of our Lord One Thousand Nine Hundred and twenty three and of the Independence of the said United States the One Hundred and forty seventh.

Wm. Parkin, Clerk. [Seal of the United States Circuit Court of Appeals, Second Circuit.]

[fol. 125] WRIT OF CERTIORARI AND RETURN—Filed July 9, 1923

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit entitled In the matter of Abraham Lustgarten, Bankrupt, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that [fol. 126] you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[fol. 127] [Endorsed:] File No. 29,632. Supreme Court of the United States, October Term, 1922. No. 1082. Herman G. Gerdes, as Trustee in Bankruptcy, etc., vs. Abraham Lustgarten. Writ of Certiorari.

[fol. 128] Copy

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of ABRAHAM LUSTGARTEN, Bankrupt

It is hereby stipulated, that the transcript already filed in the Clerk's Office of the Supreme Court of the United States, with the petition for the writ of certiorari, be taken as the return to said writ dated June 23, 1923.

Dated, N. Y. July 5th, 1923.

Zalkin & Cohen, Counsel for Herman G. Gerdes, Trustee.
L. J. Bershad, Counsel for Abraham Lustgarten, Bankrupt.

[fol. 129] To the Honorable the Supreme Court of the United States,
Greeting:

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and certified as the return to the writ of certiorari issued herein.

Dated, New York July 6, 1923.

Wm. Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit. [Seal of the United States Circuit Court of Appeals, Second Circuit.]

[fol. 130] [File endorsement omitted.]

[fol. 131] [File endorsement omitted.]